10407

(16,776.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1898.

No. 225.

LUCETTA R. MEDBURY, APPELLANT,

vs.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., SEPTEMBER 28, 1898.

1 In the Court of Claims, December Term, 1893.

LUCETTA R. MEDBURY
vs.
THE UNITED STATES. } No. 18656.

I.—*Petition. Filed November* 14, 1894.

The petition states that the claimant is a citizen of the United States, residing in the city of Detroit, in the State of Michigan, and is the sole heir of Samuel Medbury, who died in the city of Detroit in the year 1873; that on the 7th day of August, 1872, the said Samuel Medbury, deceased, made cash entries Nos. 2106, 2107, 2108, 2109, 2110, 2111, 2112, 2113, 2114, 2115, and 2116 at the United States land office at Bayfield, Wisconsin, and paid for the said lands the double minimum price of $2.50 per acre, the said lands being at time of entry within the limits granted to the State of Wisconsin by the act of May 5, 1864 (13 Stat., p. 66), for the construction of a railroad from Portage city to Bayfield, and thence to Superior or Lake Superior, in the State of Wisconsin; that the said railroad was never built from Ashland to Superior, and that the said land grant was forfeited between Ashland and Superior by the act of March 2d, 1889, and restored to the public domain; that the lands entered by the said Samuel Medbury were opposite the unconstructed portion of the said railroad and were included within the limits forfeited by the said act of March 2, 1889, and restored to the public domain, and became by the said act of forfeiture outside the limits of a railroad land grant; that, accordingly, the claim-

2 ant, on the 29th day of October, 1894, applied to the Commissioner of the General Land Office for the repayment of $1.25 per acre upon the 7,244.27 acres entered by the said Samuel Medbury, under the provisions of the 2d section of the act of June 16, 1880 (21 Stat. L., 287); which said applications have been rejected by the said Commissioner, acting under the rulings and instructions of the honorable the Secretary of the Interior.

The petition further states that the said Samuel Medbury paid double minimum price for the said 7,244.27 acres of land, and that the said land has since been found not to be within the limits of a railroad land grant, and that the claimant, as heir of the said Samuel Medbury, deceased, is entitled to the repayment of $1.25 per acre, under the provisions of the said act of June 16, 1880, and that the said repayment has been refused by the honorable the Secretary of the Interior.

Wherefore the claimant prays judgment against the United States in the sum of $9,055.33.

HARVEY SPALDING & SONS,
Attorneys for the Claimant.

DISTRICT OF COLUMBIA, } ss:
County of Washington, }

Edwin W. Spalding, of said county, having been duly sworn, deposes and says that he is one of the attorneys for the above-named claimant; that no assignment of said claim or of any interest therein or portion thereof has been made, excepting as stated in the said petition; that the claimant is justly entitled to the amount therein claimed from the United States, as deponent verily believes, exclusive of all offsets and just grounds of defense, and that the facts stated in the said petition are true.

EDWIN W. SPALDING,
Attorney for the Claimant.

Sworn to and subscribed before me this 14th day of November, 1894.

[SEAL.] FRANK B. MARLOW,
Notary Public.

3 II.—*Traverse. Filed November* 15, 1897.

December Term, A. D. 1897.

LUCETTA R. MEDBURY
vs.
THE UNITED STATES. } No. 18656.

And now comes the Attorney General, on behalf of the United States, and, answering the petition of the claimant herein, denies each and every allegation therein contained, and asks judgment that the petition be dismissed.

And as to so much of the said petition as avers that the said claimant has at all times borne true faith and allegiance to the Government of the United States, and has not in any way voluntarily aided, abetted, or given encouragement to rebellion against the said Government, the Attorney General, in pursuance of the statute in such case provided, denies the said allegations, and asks judgment accordingly.

L. A. PRADT,
Assistant Attorney General.

4 III.—*Findings of Fact and Conclusion of Law. Filed December* 6, 1897.

This case having been heard by the Court of Claims, the court, upon stipulation of parties as to the facts to be found herein, find the same in accordance therewith, as follows:

I.

Congress, by the act of May 5th, 1864 (13 Stat. L., 66), made a grant of lands to the State of Wisconsin for the purpose of aiding in the construction of a railroad from Portage city, Berlin, Doty's

island, or Fond du Lac, as said State might determine, in a northwestern direction to Bayfield, and thence to Superior city, on Lake Superior, which grant was by the terms of the act made upon condition that said railroad should be built.

II.

Whereupon, by authority of the Secretary of the Interior, the price of lands proposed to be reserved within the limits of said conditional grant of lands along the line of the proposed railroad between Ashland and Superior city was raised from $1.25 per acre to $2.50 per acre.

III.

Samuel Medbury entered at the land office at Bayfield, Wisconsin, on the 7th day of August, 1872, 7,244.27 acres of land within the limits of that section of the conditional grant to the proposed railroad between Ashland and Superior city, for which he was required to pay by reason of said proposed grant of lands $2.50 per acre, amounting to $18,110.67.

IV.

Samuel Medbury died in 1874, leaving as his heirs Lucetta R. Medbury, widow; Lewis O. Medbury, a son, and Esther O. Medbury, a daughter.

V.

Lucetta R. Medbury, the claimant, as administratrix, settled the estate, and after settlement of the estate Esther O. Medbury, on the 6th day of October, 1877, by deed conveyed to Lucetta R. Medbury "all and singular the lands and real estate to the said Lucetta R. Medbury belonging in law or in equity and all rights and interests of every kind therein wheresoever situated whether in the State of Michigan or in any other State of the United States or elsewhere. Also all personal property, rights in action, bills, notes, bonds, claims and demands of every nature, including any and all rights which I have or may have in or to the property of the estate of my father, Samuel Medbury, Esq., it being hereby intended to embrace all my property, real and personal, and wherever the same may be."

VI.

Lewis O. Medbury, the son, and Mary E. Medbury, his wife, by deed, executed on the 24th day of April, 1884, conveyed unto Lucetta R. Medbury, the claimant, "all lands, premises and real property of every description and wherever situated, of which the said Samuel Medbury was seized or possessed or in manner equitably entitled to at the time of his death, or which has been purchased with money or assets belonging to the estate of said Samuel Medbury since his death except those parcels this day specifically conveyed to said Lewis O. Medbury by Lucetta R. Medbury as aforesaid."

6 VII.

The conditions upon which the said grant of lands was made to that section of the proposed railroad between Ashland and Superior city were never complied with and the proposed railroad was never constructed, for which reason the said proposed grant of lands was, by the act of Congress of September 29, 1890 (26 Stat. L., 496), forfeited to the United States.

VIII.

It having been found by the said act of Congress that the lands purchased by Samuel Medbury were not alternate reserved lands along the line of a railroad within the limits granted by an act of Congress, Lucetta R. Medbury, the claimant, made application to the Secretary of the Interior for repayment of the excess of $1.25 per acre under the second section of the act of June 16, 1880.

IX.

On the 5th of October, 1897, the following action was had by the Secretary of the Interior on the claimant's said application:

"DEPARTMENT OF THE INTERIOR,
WASHINGTON, D. C., *October* 5, 1897.

The Commissioner of the General Land Office.

SIR: I am in receipt of your office letter 'M' of June 23, 1897, reporting adversely upon the application filed on behalf of
(J. R.) Lucetta R. Medbury for repayment of double minimum excess paid by Samuel Medbury upon cash entries Nos. 2106 to 2116, inclusive, Bayfield series, Wisconsin. These
7 cash entries were made on August 7, 1872, and Medbury paid at the rate of two dollars and fifty cents per acre, the land being within the primary limits of the grant under the act of May 5, 1864 (13 Stat., 66), to aid in the construction of the Wisconsin Central railroad. Said road was not constructed opposite the lands covered by said cash entries, and by the act of March 2, 1889 (25 Stat., 888), the price of lands similarly situated was reduced to one dollar and twenty-five cents per acre. The grant opposite this portion of the road was forfeited by the act of September 29, 1890 (26 Stat., 496).

From the above recitation it is clear that at the time Medbury made the entries in question he was properly charged two dollars and fifty cents per acre, the lands being rated at the double minimum price.

In the application under consideration it is urged that as the grant opposite the lands in question has been forfeited, it 'has afterwards been found' that the lands covered by said entries are not within the limits of a railroad grant, and repayment should be made under the provisions of the second section of the act of June 16, 1880 (21 L. D., 287). Said section provides:

* * * and in all cases where parties have paid double minimum price for the land which has afterwards been found not to be

within the limits of a railroad land grant, the excess of one dollar and twenty-five cents per acre shall in like manner be repaid to the purchaser thereof or to his heirs or assigns.

It has uniformly been ruled by this department that the proper construction of said section makes the condition at the time of the entry the criterion in determining the question as to whether repayment should be made under said section.

The case under consideration is in all important particulars similar to that of Byron Allison (19 L. D., 488), in which it was held that repayment of the double minimum excess cannot be
8 allowed where the land was properly held at that price at the date of its sale.

In the other hand, in the case of Thomas Kearney (7 L. D., 29), repayment was allowed specifically upon the ground that at the time Kearney's entry was made the land was not within the limits of a railroad land grant, the same having been forfeited prior to the making of his entry.

The argument filed in support of the application under consideration discloses no sufficient reason for departing from the previous adjudications of this department, and the application is accordingly denied and the papers in the case herewith returned for the files of your office.

Very respectfully, C. N. BLISS, *Secretary.*"

Conclusion of Law.

Upon the foregoing findings of fact the court decide as a conclusion of law, under authority of Foster's case (32 C. Cls. R., 170), that the petition be dismissed for want of jurisdiction.

(The court filed no opinion in this case.)

[Endorsed:] Court of Claims. No. 18656. Lucetta R. Medbury *vs.* The United States. Findings of fact and conclusion of law. Harvey Spalding & Sons, att's for claimant.

9 IV.—*Judgment of the Court.*

LUCETTA R. MEDBURY *vs.* THE UNITED STATES. } No. 18656.

At a Court of Claims, held in the city of Washington, D. C., on the 6th day of December, A. D. 1897, judgment was ordered to be entered as follows:

The court, on due consideration of the premises, find for the defendants, and do order, adjudge, and decree that the petition of the claimant, Lucetta R. Medway, be dismissed.

BY THE COURT.

10 V.—*Application of Claimant for and Allowance of Appeal.*

LUCETTA R. MEDBURY
vs.
THE UNITED STATES. } No. 18656.

At a Court of Claims, held in the city of Washington on the 14th day of December, A. D. 1897, a motion for the allowance of an appeal to the Supreme Court of the United States was filed in open court, to wit:

Now comes the said claimant and prays that an appeal may be allowed her from the judgment of the court in this case to the Supreme Court of the United States.

HARVEY SPALDING & SONS,
Attorneys for Claimant.

Mr. Spalding, for the claimant, having presented the aforesaid application for allowance of appeal filed of this date, December 14, 1897, it was ordered that it be allowed as prayed for.

BY THE COURT.

11 In the Court of Claims.

LUCETTA R. MEDBURY
vs.
THE UNITED STATES. } No. 18656.

I, John Randolph, assistant clerk of the Court of Claims, do hereby certify that the foregoing are true transcripts of the pleadings in the above-entitled cause, of the findings of fact by the court and the conclusion of law thereon, of the judgment of the court dismissing the petition, of the application for and the allowance of appeal to the Supreme Court of the United States.

Seal Court of Claims. In testimony whereof I have hereunto set my hand and affixed the seal of said court, at Washington, this 6th day of January, A. D. 1898.

JOHN RANDOLPH,
Ass't Clerk Court of Claims.

Endorsed on cover: Case No. 16,776. Court of Claims. Term No., 225. Lucetta R. Medbury, appellant, *vs.* The United States. Filed January 12, 1898.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1898.

LUCETTA R. MEDBURY, *Appellant*,
v.
THE UNITED STATES. } No. 225.

BRIEF FOR APPELLANT.

This case is an appeal by appellant from a decision of the Court of Claims dismissing appellant's petition in that court for want of jurisdiction.

Appellant is the heir of an entryman who paid the double minimum price, or $2.50 per acre, for several thousand acres of land in the State of Wisconsin, in the year 1872, the double minimum price being charged for the reason that the lands entered were at that time within the place limits of the grant to the Wisconsin Central Railroad made by the act of March 5, 1864 (13 Stat. L., 66). The road was never built opposite the land in question, and in 1890 Congress forfeited the portion of the grant opposite the said lands. Subsequently appellant made application to the Secretary of the Interior for the repayment of the excess of $1.25 per acre paid over the single minimum rate, under the provisions of the act of June 16, 1880. This application was rejected by the Secretary, whereupon appellant filed her petition in the Court of Claims, which was dismissed by that court for want of jurisdiction.

There are but two questions in the case: first, as to the applicability of the act of June 16, 1880, and, secondly, as to the jurisdiction of the Court of Claims.

The Applicability of the Act of June 16, 1880.

This statute provides:

"And in all cases where parties have paid double minimum price for land which has afterwards been found not to be within the limits of a railroad land grant, the excess of one dollar and twenty-five cents per acre shall in like manner be repaid to the purchaser thereof, or to his heirs or assigns."

Upon the forfeiture of the railroad grants by the act of September 29, 1890, opposite the uncompleted portions of railroads, the Secretary of the Interior was applied to for the repayment of the $1.25 per acre under the act of 1880, the lands entered having finally been found not to be within the limits of a railroad land grant. By decision of the Secretary of the Interior in the case of George G. Foster (Vol. 12, p. 316), the application in such case was rejected, the Secretary holding that:

"The purchase in question was made in 1886, when the price was double minimum, and it can not be said that the double minimum was erroneously charged. Such price was properly charged, and there is no authority for the repayment of any part of said amount under the act of June 16, 1880, or any other act." (Texas Pacific Grant, 8 L. D., 530; Jacob A. Gilford, 8 L. D., 583.)

The Secretary denied the application in this case for precisely the same reason. The question is, whether there is any foundation in law for the denial of the application in these cases.

An examination of the act of 1880 shows that it has

no such limitation as put upon it by the Secretary of the Interior.

The matter of railroad grants, and the reserved even sections, has been often before this court, and needs no discussion here now.

It is sufficient to recall that the court has many times defined the object of Congress in making $2.50 per acre the minimum price for alternate reserved sections along the line of railroads within the limits granted by any act of Congress. In United States *v.* Missouri, K. & T. R. R. Co., the court defined this object as follows:

"As the natural result of the construction of the road aided would be an increase in the market value of the reserved sections remaining to the United States, within the place limits of the Leavenworth road, those sections were not left to be disposed of under the general laws relative to the public domain. But in order that the Government might get the benefit of such increased value, and thereby reimburse itself to some extent for the lands granted, the act of 1863 made special provisions in reference to the reserved sections and thereby, for the accomplishment of particular purposes, expressly declared, segregated them from the body of the public lands of the United States."

And in United States *v.* Ingram, No. 82 of the present term, decided January 3, 1899, the court said:

"The general policy in respect to railroad grants, expressed in many statutes making such grants, and finally carried into the Revised Statutes in section 2357, is that while the ordinary price of public lands is $1.25 per acre, 'the price to be paid for alternate reserved lands, along the line of railroads within the limits granted by any act of Congress, shall be $2.50 per acre.' * * * The reason for this addition to the price of alternate reserved sections within a railroad grant has been often stated by this court, and is referred to in the opinion in United States *v.* Healey, *supra*. It is that a railroad ordinarily

enhances the value of contiguous lands, and when Congress granted only the odd sections to aid in the construction of one it believed that such construction would make the even and reserved sections of at least double value."

Bearing in mind, therefore, that the price of all agricultural lands is $1 25 per acre, except that of alternate reserved sections along the lines of railroads within granted limits, it follows that wherever this double minimum price has been charged for public lands that do not actually receive the benefit of a completed railroad, an injustice has been done. The Government has received $2.50 per acre in the way of recoupment for a grant, when it has parted with no lands and needs no recoupment. Unless the land for which the double price has been charged is actually along the line of a railroad, the construction of which was induced by the Government grant, there has been a failure of consideration on the part of the Government to the extent of one-half of the purchase money, or $1.25 per acre. This failure of consideration and the resulting equitable claim to repayment, Congress undertook to make good by the act of June 16, 1880. It is a general act and it is probable that by no other selection of words could Congress so clearly have described its object; which is to grant repayment in every case where the double minimum price had been charged by reason of a railroad grant, and the reason for that charge had ceased.

The act applies to every case where it can be shown that the double minimum price has been charged, and where the land entered has afterwards been found not to be within a grant.

This condition can come about in a number of ways.

First. It may be shown that the land entered was not within the actual limits of a grant at time of entry, the

double minimum having been charged by mistake of the local land officers in construing the map of the grant sent them by the Land Office.

Second. The land may have been within the limits of the grant as defined by the first map, or the map of general route, which was authorized to be filed in several of the granting acts, and on the filing of the map of definite location the land may have become outside the grant as definitely fixed.

Third. The Department may have construed a grant to extend to certain places and subsequently been overruled in this by a judicial decision, or by a subsequent Departmental decision.

Fourth. Congress might, by legislation, change the location of the route and of the grant.

Fifth. Congress might forfeit the grant for the non-building of the road, or a portion thereof, and resume title to the odd sections previously granted.

Sixth. A grant might be declared forfeited by judicial proceedings where the road has not been built in conformity with the granting act.

In all of the cases mentioned land for which double minimum price had been paid would afterwards be found not to be within the limits of a grant. The consideration for which the extra $1.25 per acre had been paid would, therefore, have failed. In each of the cases specified there would be a right to the repayment of the $1.25 per acre mentioned in the law. They all come within the words of the law, and within its meaning. And it is not to be supposed that Congress did not intend the redress to be given in every such case.

The Secretary, however, does seek to limit the law, as shown by the decision in the Foster case and in this case. His construction would limit the law to a portion only of the cases in which repayment would be due, and

those not the most meritorious portion. Of the many ways in which the consideration for the extra $1.25 per acre might fail, and entitle an entryman to repayment, there can be found but two which would bring him within the rule prescribed by the Secretary. Those cases are the first and third of the number we have given; where land has been charged double minimum by mistake of the Government officers as to the actual location of the land; and where the Departmental decision as to the extent of a grant has been overruled by a subsequent Departmental or judicial decision, narrowing the grant. In each of these cases it might be said that the double minimum price was erroneously charged, and also that the land had afterwards been found not to be within a grant; and they would, therefore, come within the rule laid down by the Department. No other case would.

Of this construction we have to say that it is unwarranted by the language of the act; that it is opposed to the policy and meaning of the act; and, furthermore, that it is inconsistent with the practice of the Department itself.

1. The Departmental construction, in effect, consists in reading the word "erroneously" into the act before the words "paid double-minimum," so as to make it read:

"And in all cases where parties have erroneously paid double-minimum price, etc."

It is well settled that in construing a law neither an executive officer nor a court is at liberty to introduce into a statute words not found there. This court said in L. L. & Galveston R. Co. *v.* The U. S., 2 Otto, 733–760:

"To do this words must be introduced, but treaties like statutes must rest on the words used, 'nothing added thereto, nothing diminishing.'

"In Rex *v.* Barrell, 12 Ad & Ell., 468, Patteson, Justice, said:

" 'I see the necessity of not importing into statutes words which are not found there. Such a mode of interpretation only gives occasion to endless difficulty.' And the courts have always treated the subject the same way when asked to supply words in order to give a statute particular meaning which it would not bear without them. Rex *v.* Poor Law Comrs., 6 Ad. & Ell., 7; Everett *v.* Walls, 2 Scott, N. C., 531; Green *v.* Wood, 7 Q. B., 178."

What the court here says can not be done is exactly what the Department in its ruling in this case has done. It has attempted to introduce or supply a word not found in the statute. This word "erroneous" is not implied in the law, nor is it implied in the reason for the law. The entryman is just as much entitled to repayment in equity if his land becomes outside a grant by a change in the route, or by forfeiture, as he would be in case his land is found to be outside a grant by actual measurement. It is the failure of the consideration for the extra $1.25 per acre that is the reason for the enactment of the law.

The failure of the consideration for the extra $1.25 per acre is the same in both cases. As Congress has not limited the repayment by the use of the word "erroneously" the act must be construed to apply to every case, whether the double-minimum was rightfully or erroneously charged, where the land is afterwards found not to be within a grant. If the object of Congress was the correction of an erroneous act on the part of the local land officers the act would have read differently. It would have been to this effect.

"That wherever the General Land Office has charged for lands more than the legal price thereof the Secretary shall repay the sum overcharged, etc."

But this is not what Congress has said. The Secretary is not authorized to refund an overcharge in general. That would be to give one Secretary, who might differ from a former Secretary as to the price fixed by law upon the public lands, the right to make repayment, when the matter was one that called for the jurisdiction of the courts. But in the class of cases mentioned in the law, where the double-minimum price had been paid for land which was afterwards found not to be within the grant by reason of which the double price was charged, Congress did direct the Secretary to make the repayment.

That the object of the law was not the correction of errors on the part of the General Land Office is apparent from the decisions of the Secretary in construing the act, wherein, as in the case of Joseph Brown, 5 L. D., 316, and in Coffee's case, 19 L. D., 580, where there was an admitted overcharge of $1.25 per acre, the Secretary held he had no authority to grant repayment, because the lands were found to be inside a grant. It is, therefore, the question of the location of the land, with respect to the grant, that determines the right to repayment, not the question as to whether the double minimum price was erroneously or rightfully charged.

Furthermore, the ruling in this case, to the effect that there could be no repayment where the double minimum price was rightfully charged, even though the land afterwards be found not to be within a grant, is inconsistent with the decisions and the practice of the Department itself. In the class of cases which we have designated the second class, namely, those where lands were within the limits of the grant according to the map of general route, and became outside of the grant by the map of definite location, repayment has been granted by the Secretary, notwithstanding the rule laid down in the Foster

case, that the law does not apply to cases where the double minimum was rightfully charged.

This is shown by the language of Secretary Teller in the case of William P. Maclay, Vol. 2, p. 675, where he states:

"It not unfrequently happens that the granted limits as fixed by the map of general route are changed by filing the map of definite location, and lands included in the first limits are left outside of the grant as definitely fixed. Such lands are sometimes purchased while within the first limits, *and being then subject to double minimum are paid for at that price.* When finally found to be outside of the grant, the reason for such price fails, hence the necessity for the restoration of the excess of $1.25 per acre."

Repayment in such cases has always been made, as evidenced by this language. Therefore the reason assigned for denying the repayment in this case and in the Foster case is controverted by the practice of the Department itself. The Department does not confine itself to the repayment of the double minimum in cases where that price was erroneously charged, but grants the repayment as a matter of course in the class of cases referred to, where it is admitted that the double minimum was rightfully charged. Every word of this statement is just as applicable to this case as to the case mentioned. "When finally found to be outside the grant, the reason for such price fails, hence the necessity for the restoration of the excess of $1.25 per acre." So, in this case, the land, after the forfeiture, being found not to be within the grant, the reason for the extra price fails, and the necessity for the restoration of the excess of $1.25 per acre arises.

Still another suggestion of the construction of the law is found in the case of Thomas Kearney (Vol. 7., p. 29). In that case double-minimum had been charged the entryman after the forfeiture of the grant, and Secretary

Vilas directed the repayment of the double minimum excess in these terms:

"It having been found that the land entered was not when entered within the limits of a railroad land grant it follows that the application of Kearney falls within the provisions of the act above quoted."

Here the right to the repayment is based upon the fact that the land was not, when entered, within a grant; not upon the fact that the double minimum price was wrongfully charged. This construction attributes to the act of Congress this meaning:

"And in all cases where parties have paid double minimum price for land which has afterwards been found **not to have been at time of entry** within the limits of a railroad land grant the excess of one dollar and twenty-five cents per acre shall be repaid," etc.

The actual language of the act is different. It relates to land which has afterwards been found not **to be** within a grant.

The state of the land at the time of the finding is what determines the right to the repayment; not the state of the land at the time of entry.

Take the case mentioned in the decision in Maclay's case, above referred to, of land within the limits of the grant according to the map of general route. An application for repayment of the double minimum while land is in such condition must fail, because it can not be said that the land is outside a grant. Afterwards, when the map of definite location is filed, the tract is left outside the grant as finally determined. An application for repayment must then be allowed, because it is then found that the land is not, at the time of the finding, or the decision of the Secretary upon the application, within a grant.

Moreover, suppose that application in such a case was delayed some years and in the meantime another grant had been made which included the same tract. And suppose an application is then made for the repayment by reason of the change of the first grant. The application must be denied, for the reason that the land is not found, at the date of the decision on the application, not to be within a grant.

Suppose in Kearney's case the land was included within a subsequent grant, at time of application for repayment. Would the fact that the land had been outside of a grant at date of entry give a right to the repayment? Not so. The Secretary could not find at that time that the land was not within a grant, and could not authorize the repayment, for the reason that the law does not read as it is implied in the Kearney case "land afterwards found not to have been at time of entry within a grant," but reads "afterwards found not to be within a grant."

These considerations answer, we believe, the two theories of the act suggested by the Department rulings. These theories are not justified by the words of the law, and require an alteration of those words so as to bring about an entirely different meaning, contrary to all rules for the construction of statutes, or any other written instruments.

We believe the intention of Congress as shown in this statute is plain; and that is, to cause repayment to be made in every case where double-minimum price has been charged a purchaser by reason of the increased value of the lands purchased where the consideration for such increased price has failed; either by reason of the land not being within a grant in the first instance; by its becoming outside a grant from an alteration of the route by the railroad company or by Congress; or by an act of

forfeiture putting an end to the grant. In all these cases the reason for the charge of the double price has ceased. It has turned out that the lands which it was supposed might be benefited by the railroad have not been so benefited, and Congress recognized the obligation and provided for the repayment. The act recognizes the fact that all grants are in a manner tentative until the road is built and the grant earned. Until that time they are liable to be altered by the act of the railroad company or by an act of Congress changing the route, or an act of forfeiture for non-building. All these cases come under the law as plainly as do the cases admitted by the Department.

Suppose in this case Congress had altered the line of the road so as to leave the land entered by appellant outside of the grant as thus altered. Would not the land be then found not to be within a grant, and would not appellant be just as much entitled to the repayment as if his land had been found not to be within a grant by the filing of a map of definite location?

And is an act of forfeiture any different? In this case it was merely an act fixing the terminal limit of the grant, as the road had been constructed as far as Ashland. Are those who paid double minimum price beyond Ashland, expecting the road to come thus far and increase the value of their lands, to pay the same amount as those who obtained the road? We think Congress provided for all such cases of failure of consideration. The reason for the repayment in this case is greater than if the land had merely been found to be outside a grant by a mile or so upon the filing of a map of definite location. In that case he would have had the road, his land would have been substantially benefited by the road, even at a distance of a few miles, while in this case, and in all other cases of forfeiture for non-building, he would not

have the road at any distance. The reason for the repayment is much greater. Is it conceivable that Congress provided for the lesser equity, unmindful of the greater?

Appellant comes squarely within this law. When she applied for this repayment the Secretary was bound to find, as he did find in his decision rejecting the application, that the land was not within the limits of a railroad land grant. We thus have a case where it appears that double minimum price has been paid for land afterwards found not to be within a grant. We have shown that the view assigned by the Secretary for denying the application is erroneous. The next point for our consideration is as to the effect of this erroneous view and the consequent rejection of the application upon the rights of the appellant.

The Court of Claims Has Jurisdiction.

The Court of Claims took the view that the rejection of the application by the Secretary was final, and that it had no jurisdiction; that the Secretary had exclusive jurisdiction under the act of June 16, 1880.

While it is true that the public land laws constitute a special and complicated body of laws, and that they are intrusted primarily to the Secretary of the Interior for enforcement, it is by no means true that there is no appeal to any court from the decisions of the Secretary. The rule laid down by the Supreme Court is that to the Secretary is intrusted the final determination of facts in such cases as may come before him, and that his decisions as to facts are conclusive upon all the courts, but that his interpretation of the law is always subject to review and to reversal in a court of competent jurisdiction. (Cunningham *v.* Ashley, 14 How., 377; Lindsey *v.* Hawes, 2 Black, 554–563.)

All the cases involving the construction of the grants to railway companies are to the same effect, and show that counsel's contention is not well founded. In the case at bar there are no questions of fact involved. All the facts alleged by the claimant are of record in the Interior Department, and are admitted by the Secretary in his decision rejecting the application for repayment and in his return made to this court. What is involved here is simply the right of the claimant, as a question of law, to the repayment asked for. It was for the purpose of deciding just such questions that this court was instituted. This case is not peculiar or different in any way from the ordinary cases coming before this court. Every case coming here must have arisen in its inception in some Department of the Government and in some body of laws peculiar to that Department and intrusted to that Department for execution, just as this case originated in the Interior Department and in the laws relative to the public lands. Unless there is some positive provision of the law creating this court, or of some subsequent law depriving the court of jurisdiction in cases arising under the public land laws, this court must have jurisdiction in this case, and it is needless to say that no such provision has been or can be brought forward. We need only refer to the cases arising under the land laws in which this court has taken jurisdiction, such as the class of claims represented by the cases of Benjamin Healey, Frederick Southworth, and Daniel Van Iderstine, to show how contrary to the practice of this court is the claim now made by counsel for the United States, and how little it is warranted by either principle or precedent.

The second ground that was assigned for the demurrer in the Court of Claims—that the act of June 16, 1880, devolves the special duty of making the payments therein provided for upon the Secretary of the Interior, and that

in no event can this court enforce the rights conferred by that law—is equally without just foundation.

The form of the act is not different from most acts of Congress by which rights or claims against the Government are created. The Government necessarily acts primarily through its agents, the heads of the different Departments, and, accordingly, nearly every act which can ever come before this court for construction will be found to be directed to the head of some Department. It is not contemplated in these laws that the Secretary to whom the order may be directed will refuse or fail to take the action therein contemplated, and hence there is no provision in any of them conferring jurisdiction upon this court in the event that the Secretary acts erroneously or not at all. Such jurisdiction is conferred by the general act defining the jurisdiction of this court. To hold that this court has no jurisdiction in a case because it arises under a law in which the court is not mentioned would be to deprive the court of jurisdiction in every case not especially referred to the court by the act of Congress, such as the Indian depredation, French spoliation, and other claims referred to the court by special acts from time to time, as in none of the general acts fixing salaries, fees, or creating rights against the Government is the court expressly mentioned. And yet no one can doubt that behind every such act is the Court of Claims, instituted for the very purpose of enforcing rights conferred by law when such rights are denied or misconstrued by the executive officers intrusted with the execution of the law.

The act of June 16, 1880, was enacted, as are other laws, with a full knowledge on the part of Congress of the existence of this court, and of its jurisdiction in such matters, and no especial mention of the court is necessary to give it jurisdiction here. Such jurisdiction could only

be taken away by a special provision in the law that the court should not have jurisdiction, otherwise the general jurisdiction of the court in such cases will prevail. We need not point out that there is no foundation for the assumption that Congress designed to leave the question of repayment entirely with the Secretary. There would be no reason for any such action. In fact, the reasons would be all against such action, as we can conceive of no class of cases in which a judgment of a court would be more desirable than the class represented by the act of June 16, 1880, which provides simply for the repayment of purchase money paid for land entries to which the Government could not give title, and for the repayment of $1.25 per acre overcharged when it is apparent that there has has been such an overcharge. When such repayments are denied by the Secretary, no reasons can be given why this court should not inquire into the legal rights of the claimant and give judgment accordingly.

The court has rendered jugments in many cases founded upon acts of Congress similar in form and purpose to the act of June 16, 1880. The Act of March 2, 1891 (chap. 496, vol. 26, Stat. L.), for the refund of the direct tax collected under the act of 1861, is a case in point. That act provided "that it shall be the duty of the Secretary of the Treasury to pay to such persons as shall in each case apply therefor," etc., and it is well known that in default of action by the Secretary of the Treasury the claimants have brought suit in this court and recovered judgments in many cases.

The case of United States, appellant, *v.* Charles M. Taylor (104 U. S., pp. 216, 222) is another instance. That case arose under the act of June 7, 1862, making it the duty of the Secretary of the Treasury to repay, upon application being made, the moneys in the Treasury

which had been realized by the sale of real property for taxes in excess of the taxes for which the sale had been made. In Taylor's case the Secretary refused to make the payment, and suit was brought in this court to recover judgment for the amount due under the statute, and this suit was successful. The Supreme Court affirmed the judgment, holding that a right of action in this court accrued when the Secretary refused to make the payment. Similar to this was the decision of the Supreme Court in Lawton's case (110, p. 146), wherein the court said:

"The application made to the Secretary for the surplus not having been complied with, the appellee was entitled to bring this suit as on an implied contract to pay over the surplus."

The reason for the assumption of jurisdiction by this court in such cases is plain. It is that a right has been created by act of Congress and that this right should not be permitted to fail by reason of the opposition of the officer whose duty it is to carry out the will of Congress. The legal ground of the jurisdiction is stated by the Supreme Court in the case of United States *v.* Kaufman (96 U. S., 567–572), in which the court said:

"But here the case is different. The claim has been presented to and allowed by the proper officer. The claimant has pursued the statutory remedy to the end. No special remedy has been provided for the enforcement of the payment, and consequently the general laws which govern the Court of Claims may be resorted to for relief if any can be found applicable to such a case. This is upon the principle that 'A liability created by statute without a remedy may be enforced by an appropriate common-law action * * * and as against the Government there are no common-law actions, any appropriate action within the scope of the jurisdiction of the Court of Claims may be resorted to unless specially prohibited. Here the

right has been given and a liability founded upon a law of Congress created. Of such liabilities the Court of Claims has jurisdiction, and no other remedy has been provided."

It is clear, then, that under the decisions referred to, and many others not mentioned, with which the court will be familiar, the court has jurisdiction in this case.

The Court of Claims arrived at its conclusion of want of jurisdiction by dividing all claims into classes and then summarily placing claims under the act of 1880 for double-minimum excess in the one class in which it held it had no jurisdiction. No reason is given for this assignment except that the act of 1880 created a right which did not exist before and a remedy which must be exclusive. The court held in effect that there was only one law giving the right to repayment of double-minimum excess, hence it had no jurisdiction. If there had been two laws giving this right, then it would have had jurisdiction. Such in effect is the closing argument of the opinion.

The opinion misconceives what is meant by an exclusive remedy in such cases. All that is meant is that the remedy given must be followed as far as provided by the law. In this case, as in the Taylor case, the Lawton case, and the Kaufman case, the remedy provided by the law must be followed as far as it goes. But when that remedy ceased, and the right given by law is still unsecured, then there arises the right to sue in the Court of Claims to enforce the right given by Congress. It is a claim founded upon a law of Congress and is covered amply by the jurisdictional act.

The Nicoll case, cited by the Court of Claims, is entirely unlike the case in hand. In that case there existed long prior to the creation of the Court of Claims a system for the judicial trial of revenue cases. In the

Nicoll case the court held that such cases were excepted from the jurisdiction of the Court of Claims. In this case there is no judicial system, apart from the Court of Claims, and the act creating the liability on the part of Congress was passed long subsequent to the creation of the Court of Claims.

We therefore believe that the Court of Claims had jurisdiction to enter judgment in this case for the amount due under the act of June 16, 1880, on the refusal of the Secretary of the Interior to allow the claim, and we ask that the decision of the Court of Claims be reversed with directions to enter judgment for the appellant for the amount shown to be due.

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No. 225.

Brief of Spalding & Spalding for Appt.

IN THE

Supreme Court of the United States,

Filed Mar. 13, 1899.

October Term, 1898.

LUCETTA R. MEDBURY, Appellant,

vs.

THE UNITED STATES, Appellee.

} NO. 225.

APPEAL FROM THE COURT OF CLAIMS.

Reply to Brief on behalf of the United States.

HARVEY SPALDING,
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THE ADVERTISER CO., 618 F N. W.

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ASSIGNMENT OF ERRORS.

The Court of Claims erred in refusing to exercise jurisdiction in this case and in dismissing the petition.

Our brief on behalf of the appellant proceeded upon the foregoing assignment of errors which, however, were not stated with sufficient formality.

The foundation of the claimant's suit is the second paragraph of section 2 of the act of June 16, 1880, which reads as

follows: "And in all cases where parties have paid double minimum price for land which has afterwards been found not to be within the limits of a railroad land grant, the excess of one dollar and twenty-five cents per acre shall in like manner be repaid to the purchaser thereof, or to his heirs or assigns."

This statute, every word of it, shows it to be a law necessary for the correct administration of the law existing at that time fixing the price of public lands.

To a correct understanding of its full force and plain intent, it is necessary to briefly consider

THE LAW OF PRICE OF PUBLIC LANDS THEN EXISTING.

This law is contained in Sec. 2357, R. S. It divides public lands into two classes, and the absolute line between these two classes is the limits of actual grants of lands made to secure the construction of railroads. The limits of every railroad grant in the United States are drawn and marked on public maps in the General Land Office, and show the location of every acre of public land within the limits of such grants as segregated and set apart from the other great class of lands, namely, the lands outside of the limits of grants made to construct railroads. The law attaches the one price of $1.25 an acre to every acre of these lands (other than cases specially excepted by law) outside the drawn limits of record of grants to railroads. And the law sttaches to every acre of public lands within the limits of such grants the one price of $2.50 an acre. These marked limitations and the records of the Land Office show that in numbers of cases the United States have sold land for $2.50 per acre, the price of which by law is $1.25 an acre. Upon consideration the reason of this is plain, and it is shown in fact by the record of this case. The first finding of facts states that "Congress by the act of May 5, 1864 (13 Stat., L. 66), made a grant of lands to the State of Wisconsin for the purpose of aiding in the construction of a railroad from Portage City, Doty's Island, or Fond du Lac, as said State might determine, in a northwestern direction to Bayfield, and thence to Superior City on Lake Superior, *which grant was by the terms of the act made upon condition that said railroad should be built.*"

"Whereupon by authority of the Secretary of the Interior, the price of lands *proposed to be reserved* within the limits of said conditional grant along the line of the *proposed rail-*

road between Ashland and Superior City, was raised from $1.25 per acre to $2.50 an acre." (Second Finding.) Thus it appears that whenever the limits of a grant of lands *contracted for* was marked out, the lands proposed to be granted were identified and set apart for the grant, and the lands proposed to be reserved were identified and set apart for sale at $2.50 per acre. The very method of the grants rendered this necessary. It rendered necessary that the Government should set apart in trust for the railroads the lands to be granted and to set apart the lands to be reserved for sale at $2.50 per acre, the price being necessarily a conditional price, subject to the same conditions that the grant itself was subject to, namely, the construction of the railroad, upon which condition only the grant could take effect. The sole statutory condition and consideration of an extra price of $1.25 per acre is shown to be the construction of a railroad near the lands by the appropriation therefor of the sections of land alternate to those subjected to such extra price. The actual limits of a railroad land grant were in every instance finally settled and determined by the adjustment of the grant, and the grant was never adjusted except on or after the actual transfer of the lands to the company. It followed that in many cases upon adjustment of the grant it was shown that lands had been sold for $2.50 per acre which were not within the limits of the grant. Manifestly, in every instance where the price of lands within a grant has been charged for land afterwards found to be not within such limits, such lands were never within the limits of a grant. Much confusion of ideas seem to prevail in the discussion of this subject in confounding an actual grant of land to a railroad company with that of a grant proposed or contracted for, which never in fact was made. Manifestly, there never was a grant of land to a railroad company where no lands were transferred. And there is a plain distinction between the grants contracted for and actual grants, for the known reason that many grants contracted for were never in fact made, and their forfeiture was declared by act of Congress. There can be no forfeiture of any actual grant of lands to railroads, because in every such case the lands have been conveyed to the railroad. The very word forfeiture, in such cases is limited to grants proposed or contracted for. It is contracts for grants made upon condition of construction of a railroad which alone are subject to forfeiture. In administering the law the lines of the limits of the grants proposed were drawn, but no such lines are described in Sec. 2357 R. S., which alone divides the $2.50 per acre class of lands from the $1.25 per acre class. The sole basis and consideration for the extra price of $2.50

per acre is by statute shown to be the fact that a railroad was constructed near such land by the appropriation of sections of land alternate thereto. Where no railroad was thus constructed and no alternate sections transferred and appropriated to effect such construction of a railroad, there was no basis and no consideration for such extra charge. There is no case where lands of the $1.25 class have been subjected to pay the price of the $2.50 class in which the obligation does not rest upon the Government to repay to the purchaser the extra charge. Before the act of June 16, 1880, it is true that the purchasers in such cases were without the means to enforce this obligation. The learned counsel for the appellees has shown to the court what injustice such purchasers suffered before the act of June 16, 1880, was passed. On page 23 of his brief he quotes from Mr. Berry, of the Committee on Public Lands, who said: "The bill as amended also provides that in cases where parties have been required to pay double minimum price for lands *supposed* to be within railroad reservations, and it afterwards proved not to be within said reservations * * * the Secretary of the Interior shall refund the extra $1.25. * * * The Government should certainly refund the money to the parties to whom it justly belongs, and has no right to retain money for which it gave nothing. * * *" Mr. Berry, one word more; one feature of the bill is to refund the extra $1.25 where the amount was supposed to be double minimum when the Government sold it and the price of $2.50 per acre was paid, but which was afterwards ascertained not to be double minimum land. This $1.25 per acre lies in the Treasury of the United States, and properly belongs to the men who paid it into the Treasury. There is no means by which you can get it. There have been from time to time special bills presented to refund money in certain cases and to certain individuals, and the committee deemed it better to frame a general law TO COVER ALL THESE CASES" * * * . "Mr. Lounsbery. Can the gentleman refer to any opinion of the Secretary of the Interior, in which it is held that he has not the power to refund money under the section of the statute which has been read here, where a double minimum price has been paid and double minimum lands have not been granted. Mr. Berry. I do not know that I can refer directly to any written opinion of the Commissioner or of the Secretary of the Interior, but I called upon the Commissioner myself and he informed me that he could not refund this money for the reason, I believe it was, *that at the time of the sale, the Government regarded that as a double minimum.*"

Upon this representation in Congress by members of Con-

gress that the extra charge of $1.25 per acre made and paid for land found not to be within the limits of a railroad land grant, was money belonging to the purchasers and not to the United States, the Congress ordered the Secretary of the Interior to repay it to the owners and in strong, emphatic terms, commanded that officer to "draw his warrant on the Treasury" and declared that "the same shall be paid." This statute in specific terms acknowledges and determines a specific debt to be due the beneficiaries of the act and contracts to pay the debt. If this is not a statutory contract, no such contract ever existed. This contract gave the Secretary of the Interior no jurisdiction whatever to perform judicial or semi-judicial acts. The duty enjoined upon him is purely a ministerial duty and under the statute he had no power to do anything, except to draw his warrant on the Treasury for the money determined by statute to belong to the purchaser of the land who paid the extra price without any basis or consideration whatever.

Upon consideration of Sec. 2357 R. S. and of the second paragraph of the second section of the act of June 16, 1880, it is impossible to escape the conviction that Congress intended that all purchasers of public lands should have them at the price of $1.25 per acre, if not lands benefited by being within the limits of an actual grant of land by which a railroad near them was constructed and that purchasers of lands which from any cause were treated as lands thus benefited and for that reason subjected to the extra price, but which in fact were not thus benefited because not alternate reserved lands along the lines of railroads within the limits granted by any act of Congress, should have the extra price paid returned to them.

In view of this, how can the learned counsel for the appellees contend before this Court that this Court should construe the act of June 16, 1880, from which the law-makers excluded the words "erroneously charged" as if the law makers had actualy inserted them? And how can he ask this Court to construe this law in which the law makers inserted the words "to be" after the word "found" and who excluded the words "not to have been" after that word as if the last words quoted had been inserted in the law and the words "to be" excluded therefrom?

The learned counsel seems to be right in his assumption that his whole defense fails unless this Court will change the law as he admits the Secretary of the Interior has attempted to change it. This attempted change assumes that by some impossible blunder the Secretary of the Interior would sometimes charge land neither within the limits of any actual grant

nor within the limits of any grant contracted for the double minimum price and that in such cases only could any repayment be made. This ground of repayment is excluded from the statute, but is here offered to the Court in order to exclude from the law the sole ground of repayment embodied in the law. The law which the learned counsel now proposes to enact, would return the extra price of land if located immediately outside the limits of an actual grant by which a railroad was constructed and at the same time it would make a wholesale denial of such repayments as to lands purchased on the faith of the government embodied in a statute to cause to be constructed near them a railroad by a grant of the sections alternate to those subjected to the extra charge, but which by a subsequent abandonment by the Government and the proposed grantee were left hundreds of miles remote from any railroad communication. Congress never put a single word in any statute giving any shadow of color for such a pretension. If it be called a theory, it is a theory created out of whole cloth and is absolutely repugnant to every statute upon the subject of the price of public lands.

The second paragraph of the second section of the act of June 16, 1880, created an absolute equality of rights as to all purchasers of land at the double minimum price to have the extra $1.25 per acre returned to them if the lands purchased were afterwards found not to be within the limits of a railroad land grant. If the Secretary of the Interior pays any such purchasers, he is guilty of manifest discrimination against others having the same rights if he refuses to pay all. And if he pays any, his sole warrant therefor is because the statute makes the sum paid a debt payable, and upon this ground alone can he pay any. If any payments made are of debts payable, all such cases are debts due from the Government, and if they be debts payable, the sole power or jurisdiction the Secretary of the Interior has, is to draw his warrant upon the Treasury in payment, and the performance of this duty on his part is not an exercise of any jurisdiction involving the exercise of any judicial or discretionary authority, but is the performance of a purely ministerial act.

All these debts, in payment of which the Secretary of the Interior is by law commanded "to draw his warrant on the Treasury" are contract debts, and this contract for the payment of these debts is of the highest possible authority. If the Secretary refuses to obey the law and refuses to pay as in the case at bar, the unpaid debt is a contract debt, and the

Secretary of the Interior is wholly without power to impair this contract liability of the Government.

The brief of the learned counsel appears to be founded upon the assumption that all grants of land formulated and proposed in statutes are actual grants, regardless of the fact as to whether any railroad was ever constructed or whether any lands were ever transferred to the grantee.

A grant of land upon conditions is not an unconditional grant and a grant of land upon the condition that a railroad be constructed is no grant if the railroad be not constructed, and if the railroad be not constructed, there is no line of railroad, no alternate reserved land, and no limits of any grant made by any act of Congress. Upon such a state of facts, neither executive officers nor courts can assume the existence of a line of railroad, or the existence of alternate reserved lands, or the existence of any limits of a grant to a railroad made by any act of Congress. And without assuming the existence of all these, the price of $2.50 per acre fails absolutely and the one price of $1.25 per acre prevails. It is plain that where executive officers have assumed the existence of a line of railroad constructed by the appropriation of public lands, and the existence of a land grant, and the existence of alternate reserved lands along the line of railroad so constructed, and have by such assumption charged and received the extra price of $1.25 per acre, when in point of fact not one of the assumptions was warranted by existing facts. a supreme obligation rests on the Government to repay the extra price based on such assumption.

The learned counsel has introduced into his brief evidence of the fact that this supreme obligation was recognized as the reason for the enactment of the statute upon which this claim is based. The law makers distinctly stated that the money in such cases was in the Treasury but did not belong to the Government, but did belong to those who had paid that extra price. It is beyond question that Congress, in that statute, intended to recognize and make that fund a trust fund, due and payable to those who were subjected to the extra charge. This money is not only a debt due in the ordinary sense of the word, but it is a trust fund in the hands of the United States, and the United States as trustees cannot keep this money from the true owners of the fund without degredation and dishonor, such as cannot be attributed to the United States.

The authority of the Secretary of the Interior to treat a statute containing a conditional grant of lands made to construct a line of railroads from the time of its enactment up to the time of compliance with the conditions by the proposed grantee in all respects as an actual grant is clear, and this includes the running of the limits of the proposed grant, the identification of the lands to be granted and the identification of the lands to be reserved, and the holding of the lands to be reserved for sale at the price of $2.50 per acre. While doing all this, the Secretary was powerless to carry into effect the statute as to either class of lands thus identified until the construction of the aided railroad. Upon total and final failure of the grant contracted for, the government could not retain the $1.25 per acre extra price received for lands sold in consideration of the construction of the railroad by the aid of the appropriation of the sections of land alternate to those sold without a palpable betrayal of those who paid such extra price upon that consideration. Every conditional grant of lands immediately raises the question of price as to all lands designated to be reserved under the proposed grant and that question, although presumptively in favor of $2.50 per acre therefor, is never disposed of decisively till the grant is adjusted; and if the grant be finally adjusted by its forfeiture by act of Congress, it is then decisively settled that the price of the land proposed to be reserved in the forfeited grant is $1.25 per acre and not $2.50 per acre. Before forfeiture in every such case, the lands classed as reserved lands are sold at the presumptive price of $2.50 per acre. After forfeiture the whole of the lands which were to have been granted are sold at the statutory price of $1.25 per acre by the Government and all of the lands classed as reserved lands not sold at $2.50 per acre previously, are sold for $1.25 per acre. It can not be attributed by citizen, officer, or court to any statute enacted by Congress that any authority was ever given to perpetrate the monstrous injustice as to the disposition of public lands of equal value to citizens having equal rights that some should be charged and made to pay $2.50 per acre while others adjoining them were required to pay only $1.25 per acre. And yet, the action of the Secretary of the Interior, the denial of jurisdiction by the Court of Claims and the contention of learned counsel for the appellee in this court, we regret to be compelled to say, are all meaningless, unless they support and maintain this unparallelled wrong.

In the 9th finding of facts on page 5 of the record, it appears that the Secretary of the Interior assumes every conditional

grant of land for the constructson of railroads afterwards forfeited to be an actual grant, and that the price of $2.50 per acre for the lands designated for reservation, was not a price predicted upon the conditions contained in the statute, but was an absolute, final price fixed by law. In the case of Thos. Kearney, reported in this finding, it appears that the Secretary held that if his entry of land at $2.50 per acre had been made the day before the forfeiture of the grant, the Secretary would have denied payment to him of the extra price of $1.25 per acre, but the entry having been made *after* the forfeiture, he held that for that reason *alone*, he was entitled to be paid.

The assumption of the Secretary which constitutes the sole foundation of his ruling, is repugnant to reason and to law, because there never was a grant of lands where the land never passed from the grantor and where the alleged grantee never took title thereto. Upon consideration it will be seen that this assumption of the Secretary of the Interior constitutes no warrant whatever for his final action, for with the aid of this assumption, he is powerless to limit the law in his reading of the law enacted by Congress. This reading is as follows: "And in all cases where parties have paid double minimum price for the land which has afterwards been found not to be within the limits of a railroad land grant the excess of $1.25 per acre shall in like manner be repaid." This reading of the law renders absolutely ineffective the assumption of the Secretary of the Interior, because it is indisputable that land once included in a proposed grant of land at the time of the sale of the land, is found to be not within the limits of a railroad land grant by the highest authority in this country, when Congress extinguishes the proposed grant by statute. Both the Secretary of the Interior and the learned counsel for the appellee seem to be conscious of this difficulty, for they come to this court and ask that the reading of the statute be changed from the language of the statute quoted. The defense fails altogether unless the reading of the actual statute enacted by Congress be changed so as to read as follows: "And in all cases where parties have paid double minimum price for the land which has afterwards been found not to *have been* within the limits of a railroad land grant *at the time of purchase*."

This is the defense relied on in this court. It proposes to reject words used by the law-making power and incorporate words excluded from the law by that power.

If the reading proposed by the learned counsel and the Secretary of the Interior could be transformed into law, that law

would be an absurd nullity and would neither create for payment a debt, nor effect the payment of any gratuities, because it can not be supposed that the Secretary of the Interior controls and conducts public business entrusted to him in such a manner as to charge double minimum price for lands without any colorable ground for such charge, as would in fact be the case if he subjected $1.25 per acre lands outside of all limits of actual or proposed grants of land to the price of $2.50 per acre.

The learned counsel in his brief has shown to the Court that Congress enacted the second paragraph of the second section of the act of June 16, 1880, because before that the Secretary of the Interior refused to repay the extra $1.25 per acre in such cases upon the ground, "that at the time of the sale the Government regarded that as a double minimum." It is shown in the 9th finding, on page 5 of the record, that the Secretary assigned for his refusal to pay this debt, a reason identical to the reason the Secretary formerly assigned for non-payment of such cases to remedy which this statute was enacted. In connection with this, we have shown by analysis of the law and the reasons assigned for non-compliance therewith, a clear case of the attempted nullification of a statute, every word of which forms a part of a contract on the part of the Government to pay debts due the people and debts of no ordinary character, for the statute in terms shows that the money ordered to be paid is in the Treasury and does not belong to the United States, but does belong to certain creditors of the Government.

The learned counsel has printed as an appendix to his brief the opinion of the Court of Claims in the Foster case. That case represents nearly all the cases within the law which the Secretary of the Interior refuses to pay. They are claims of about $200 or less each, and therefore not appealable by the claimants to this court. The denial of jurisdiction by the Court of Claims, which was a great surprise to us, rendered it impossible to bring to this court the questions of law involved for review by any other method than the proceedings in the case at bar, which in fact is the only case we know of appealable to this court by reason of the amount involved.

Two statutes, each of which is a contract with the people of supreme authority have been set aside for annulment by executive officers charged with the great duty of their full and faithful execution.

The first is that of Sec. 2357 R. S., by which the price of all agricultural public land not alternate reserved lands along the line of railroads, within the limits granted by any act of Congress is made $1.25 per acre.

The second is the second paragraph of the second section of the act of June 16, 1880, which contracts with all purchasers of public lands, that if the lands purchased by them are at the sale treated as lands benefited by the construction of a railroad near them by aid of an appropriation of the alternate sections, and for that reason they were required to pay $2.50 per acre, and it afterwards turns out that the lands purchased are not so benefited and are not alternate reserved lands along the line of railroads within the limits granted by any act of Congress they shall be repaid the extra price of $1.25 per acre charged.

The Court of Claims has refused to disturb this attempted annulment by executive officers of statutory contracts with the people.

The sole question here is whether statutory contracts with purchasers of public lands embodied in the two statutes shall be enforced by the mandate of this court directing the Court of Claims to enter a judgment for extra price charged for lands for benefits never accorded the purchasers by the United States, in obedience to the commands of the Congress contained in the statutes cited.

We submit that the appellant is clearly entitled to the reversal of the judgment of the Court of Claims in this case.

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No. 225.

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for Appellees.

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In the Supreme Court of the United States.

OCTOBER TERM, 1898.

LUCETTA R. MEDBURY, APPELLANT,
v.
THE UNITED STATES, APPELLEES. } No. 225.

ON APPEAL FROM THE COURT OF CLAIMS.

BRIEF ON BEHALF OF THE UNITED STATES.

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OCTOBER TERM, 1898.

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v.
THE UNITED STATES, APPELLEES. } No. 225.

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BRIEF ON BEHALF OF THE UNITED STATES.

STATEMENT.

The appellant filed her petition in the court below demanding the return of one-half the purchase price of certain public lands purchased by her ancestors from the United States at and for the sum of $2.50 per acre. At the time of said purchase (to wit, on the 7th of August, 1872), the said land was part of the lands reserved to the United States within the granted limits of a grant to the State of Wisconsin in aid of the construction of a

certain railroad under the act of May 5, 1864 (13 Stat. L., 66), and were, by the express provisions of section 4 of said act, increased to and salable only at the price of $2.50 per acre (see section 4 of said act, 13 Stat. L., p. 67). At the time that these cash entries were made, therefore, the lawful price of the land was $2.50 per acre, and under the positive provisions of the law making the grant, could not have been sold for a less sum.

The railroad in aid of which the grant was made was not built and the grant was forfeited to the Government by the act of September 29, 1890 (26 Stat. L., 496), and restored to the public domain, but no provision was made in said act for reducing the price of reserved sections along said grant. The land purchased by the appellant was opposite an unconstructed portion of said railroad and was included within the limits forfeited by said act of September 29, 1890. Accordingly, it is claimed that the land is such as is "not found to be within the limits of a railroad grant," within the meaning of that expression as contained in the act of June 16, 1880 (21 Stat. L., 287), and on October 29, 1894, the appellant made application to the Secretary of the Interior for repayment of one-half of the purchase price of said land under the provisions of said act of June 16, 1880. The application was rejected for the reasons set forth in the Secretary's letter of October 15, 1897 (see Finding IX, transcript p. 4).

While this application was pending before the Secretary of the Interior, to wit, on November 14, 1894, the appellant filed her petition in the court below demanding judgment for one-half of the purchase price, under the

provisions of the act of June 16, 1880. In the meantime another case (to wit, the case of *Foster* v. *The United States*, 32 C. C., 170, which is printed as an appendix to this brief), involving the same cause of action, was heard in the court below, upon the defendants' special demurrer to the jurisdiction of the court, in which said case the demurrer was sustained; and subsequently, to wit, on December 6, 1897, findings of fact were filed in the case at bar and a conclusion of law dismissing the same upon the authority of Foster's Case, *supra*, from which said judgment of dismissal the appellant has prosecuted this appeal.

The brief which has been filed on behalf of the appellant does not contain any specifications of error, and in this regard is violative of the twenty-second rule of this court, and under section 4 of that rule is amenable to a motion to dismiss. The brief proceeds mainly upon the assumption that the court below has jurisdiction to review the decision of the Secretary of the Interior, and proceeds primarily with an extended discussion of the law, for the purpose of showing that the construction placed upon the act of June 16, 1880, by the Secretary of the Interior is erroneous, and that that officer should have made the repayment to the appellant under the provisions of that act. It does not seem to us that there is any such question properly before this court, the whole inquiry being whether or not the remedy created by the act of June 16, 1880, is cognizable by the Court of Claims.

No other question was passed upon by the court below, and no other question is raised by any specification of error in the brief; and we take it that even if it should be held here that the court below erred in holding that

the right created and the remedy provided in the act of June 16, 1880, was solely within the cognizance of the Secretary of the Interior, still this court would only so instruct the court below and remand the case, with directions to entertain the cause of action and to render judgment therein according to law; but if we should be mistaken in this view, certainly the primary inquiry is as to the jurisdiction of the court below, and upon that issue we submit that the judgment of the court below was clearly right, for the reason that the right created and the remedy provided by the act of June 16, 1880, being the creation of a right which had no previous existence, either in statute or by provisions of general law, the right so created and the remedy so provided can only be pursued in the precise forum and in the exact manner provided by the statute. No other tribunal can enforce the right, for in any other tribunal there is no right to enforce.

I.

THE CLAIM IS FOUNDED SOLELY UPON THE ACT OF JUNE 16, 1880.

The first and most important fact to be borne in mind in the examination of this question is the fact that but for the provisions of the act of June 16, 1880, the appellant could not possibly have had any claim against the United States enforcible in the Court of Claims or anywhere else. At the time that she purchased this land it was within the limits of a railroad grant, and by the positive provisions of section 4 of the act of May 5, 1864 (13 Stat. L.,

67), the lawful price of the land was $2.50 per acre, and it could not have been lawfully sold for a less sum. This is also true under the provisions of section 2357 of the Revised Statutes, which was in full force and effect at the time the appellant made this cash entry in 1872. The land therefore being within the limits of a railroad grant at the date of purchase, was properly rated at that price, which was the only lawful and proper price, and the sum paid to the United States by the appellant for said land was lawfully and properly paid and received, without any fraud, coercion, accident, or mistake, either of law or of fact. This money having been lawfully and properly paid into the Treasury, there was no possible means of having it refunded except by a general or special legislative enactment.

It is entirely immaterial that the railroad was in fact not built, since the law making the price of this land double minimum price contains no reference to the subsequent completion of the railroad and does not in anywise guarantee the completion of the railroad, and does not make the increase of price at all dependent upon the completion of the railroad. It merely provides that the land shall not be sold for less than $2.50 per acre whenever the same lies within the limits of the grant of a railroad, and its provisions concerning price can not in anywise be interpreted as a covenant or guaranty that the road will ever be built. If it subsequently transpires that the road is not built, and the grant is forfeited and restored to the public domain, it remains a question of policy on the part of the Government with relation to the refunding to the entryman of the amount over single

minimum price. But if the Congress subsequently chooses to do this, by special or general law, it is a mere gratuity on the part of the Government. Without this gratuity there, of course, could be no ground for demanding the return of this money, which could be enforcible in any court upon any principle of law. It is idle to talk about there being an implied contract to pay back such money; and while, proceeding upon the idea that the entryman was to receive land made more valuable by the construction of a railroad, should therefore have the excess over single minimum price refunded to him upon the noncompletion of the road, there may exist some sort of natural equity or moral obligation which may operate upon the conscience of the Congress, yet it is a mere intangible matter of morals, which of course could never ripen into an implied contract enforcible in the courts.

To use the language of the court below:

> If in the case now before the court there had existed a right of action at common law, or a claim created by some statute anterior to the act of June 16, 1880, the proceedings prescribed by that act before the Interior Department would be regarded as an auxiliary remedy—as a quick and simple proceeding to enable claimants speedily to procure redress. But the court is of opinion that no such right existed. The claimant's land was in the purview of a railroad grant at the time of its purchase; the statute fixed the price of such land at $2.50 an acre; both parties regarded $2.50 an acre as the value of the land at that time and in its then condition, and the Government did not guarantee performance on the part of the railroad grantee. When Congress

annulled the grant and the reserved sections dropped back into the public domain, it was the result of the railroad company's inaction and not an act of voluntary interference on the part of the Government.

It will be seen, therefore, that independently of the provisions of the act of June 16, 1880, there is absolutely no foundation whatever for this claim, and it is to that act exclusively that we are to look for whatever right exists in favor of the appellant; and this fact is apparently conceded by the appellant, for her whole petition is framed upon that contention and the claim has never been voiced upon any other hypothesis.

II.

THE COURT OF CLAIMS HAD NO JURISDICTION TO ENTERTAIN THIS ACTION FOR THE REASON THAT THE SAME IS FOUNDED SOLELY AND EXCLUSIVELY UPON A LEGISLATIVE ACT, WHICH PROVIDES THE REMEDY AND THE MANNER OF ITS ENFORCEMENT AT THE SAME TIME THAT IT CREATES THE RIGHT; AND A RIGHT SO CREATED CAN ONLY BE ENFORCED IN THE EXACT MANNER PROVIDED IN THE STATUTE.

When a right is given by statute and a specific remedy provided, or a new power, and also means of executing it are therein granted, the power can be executed and the right vindicated in no other way than that prescribed by the act. This rule does not conflict with the general rule that the jurisdiction of the court is not impaired by statutes conferring upon other tribunals jurisdiction of the same kind and to reach the same redress, unless the

statute expressly takes away the former jurisdiction; nor with that other well-settled rule that if a statute gives a remedy in the affirmative without a negative, express or implied, *for a matter which was actionable at common law*, the party may sue at the common law as well as upon the statute. In the cases to which these rules are applied, the right existed and its enforcement lay within the appropriate existing jurisdiction. Statutes affirmative of the right and prescribing other than the usual remedies for its enforcement, or conferring cognizance of it upon other tribunals, not negativing the preexisting remedies or jurisdiction, are, in their very nature, merely cumulative and not exclusive. But when the right is solely and exclusively of legislative creation, when it does not derive its existence from the common law, but from the statute only (such as the right conferred by this act of June 16, 1880), then jurisdiction may be limited to particular tribunals and new and specific remedies provided for its enforcement; and the jurisdiction *can be exercised and the remedy pursued only in the precise forum and in the exact manner provided for in the statute.* The same legislative power that created the right also creates the remedy and the forum for its enforcement. These things are one; they are a legislative trinity which is inseparable and indivisible. No other tribunal can enforce such right, for the reason that in any other tribunal there is no right to be enforced.

Wells v. *Supervisors*, 102 U. S., 625, 631, 632; *Vancey* v. *Bewell*, 55 Ala., 408; *Philips* v. *Ash*, 63 id., 414; *Chandler* v. *Hanna*, 73 id., 390; *Hollister* v. *The Bank*, 2 Keys (N. Y. Ct. App.),

245, 249; *Dickinson* v. *Warner*, 39 Mich., 141; *Sutherland* v. *Stat. Con.*, secs. 399, 454–459; Sedgw. on Stat. and Const. Law, 343.

As was said by Mr. Chief Justice Waite, in *Wells* v. *Supervisors* (102 U. S., 625, 632):

> This statute confers an extraordinary power on the board of police. It authorizes them to create a new liability for their respective counties, and provides a special way of discharging that liability. The liability and the mode of discharging it were provided for in the same statute. This being so, the mode prescribed is exclusive of all others.

In organizing the powers of government there is a definite and precise scheme or plan, and a unity and singleness of means employed to carry it into effect. There is but one chief magistrate, one legislature, one judiciary. The exercise of power by one over the other must be authorized by law. Its possession and scope will be such as is specifically granted. When granted, if the mode of its exercise be also prescribed, it must be followed strictly and can not be exercised in any other way. In grants, and in the regulation of the mode of their exercise, there is an implied negative—an implication that no other than the expressly granted power passes by the grant; that it is to be exercised only in the precise mode pointed out in the grant itself. Affirmative words may and often do imply a negative, not only of what is not affirmed, but of what has been previously affirmed, and that, too, as strongly as if the negative were expressed. An affirmative enactment of the new rule implies a negative of whatever is not included in it, or of whatever is different

from it; and if, by the language used, a thing is limited to be done in a particular form or manner, or a remedy is to be executed by a particularly designated person, court, or commission, it includes a negation that it shall not be done otherwise. The intention will not be ascribed to the lawmaking power to establish conflicting and perhaps hostile systems upon the same subject, whereby legislation would become an idle ceremony and the law subjected to the reproach of uncertainty and unintelligibility.

It is thoroughly well settled that—

First. The creation of a new jurisdiction is not to be presumed, in the absence of adequate language. (*Warwick* v. *White*, Bunb., 106; *Kite's Case*, 1 B. & C., 107; *Rex* v. *Baines*, 2 Ld. Raym., 1269; *Ex parte Story*, 32 B. Div., 166; *James* v. *Railroad Company*, L. R., 7, Ex., 296; *Street* v. *Rothschild*, 12 Daly (N. Y.), 95; *In re Contested Election*, 111 Penna. State, 235; *Druse* v. *Harter*, 57 Wisc., 644; *Henderson's Case*, 39 Maine, 476; *Pittman* v. *Flint*, 10 Pick (Mass.), 506, where it is said that "a failure of justice would not be sufficient ground for construing statutes against their clear meaning so as to give a court jurisdiction.")

Nor will a construction be adopted which enlarges the jurisdiction of courts, in the absence of express words or necessary implication. (*Ex parte Story*, 3 Q. B., Div. 166; *Kite's Case*, 1 B. & C., 107; *Thomas* v. *Adams*, 2 Port. (Ala.), 108; *Inspectors* v. *Peoria*, 20 Ill., 532; *Thompson* v. *Coy*, 8 Jones (No. Ca.), 311; *Druse* v. *Harter*, 57 Wisc., 644; *Duffin* v. *State*, 11 Tex. App., 76.)

And, *a fortiori*, is this true when we remember that the Government can not be sued without its express consent, and that all statutes permitting such suits, being in derogation of the rights of the sovereign, are to be strictly construed. Nothing is to be taken by intendment, and only such jurisdiction is given as is set forth plainly and expressly. (*Clyde's Case*, 13 Wall., 39; *Finn's Case*, 123 U. S., 227–233; *Schillinger's Case*, 155 U. S., 163–166; *Green* v. *Graham*, 29 Ala., 61.)

Second. Statutes which create liabilities where none existed before are always strictly construed, and the liability will never be extended beyond the plain and express provisions of the statute. (*Holister* v. *Bank*, 27 N. Y., 393–399; *Kohn* v. *Newes*, 40 Wisc., 393; *Moyer* v. *State Co.*, 71 Penn. State, 293; Lane's Appeal, 105 Penn. State, 49; *Detroit* v. *Chaffee*, 70 Mich., 80; *Detroit* v. *Putnam*, 45 Mich., 265.)

The public domain is wholly and exclusively within the control of the Congress. In the exercise of its plenary power the Congress has seen fit to authorize the Secretary of the Interior to refund certain fees and payments in certain cases; but there has been no such authorization given to the Court of Claims, and the right created by the provisions of this act of June 16, 1880, can not in any wise be regarded as the creation of a cause of action which falls within the enumerated claims over which that court has been given jurisdiction.

The right to the repayment conferred by the act of June 16, 1880, is exclusively the creation of statute, and the right can only be enforced in the precise manner mentioned in that statute. The statute authorizes the

Secretary of the Interior, and him only, to make such repayment. The statute has not authorized any court to make the repayment. The claimant has no rights whatever outside of those given and created by the statute, and the statute only gives him a right to apply to the Secretary of the Interior for the repayment. It has not given him a right to make such application to the Court of Claims, or to any other court, but, on the contrary, has, by implication, emphatically denied him that right. *Expressio unius est exclusio alterius;* and claims for repayment under this act are as much excluded from the jurisdiction of the court below as they are granted to the Secretary of the Interior.

There is no similarity whatever between the right created and the remedy provided under the act of June 16, 1880, which is the sole foundation of the claim in the case at bar and that class of claims created by the Direct Tax Act of March 2, 1891 (26 Stat. L., c. 496), for in the Direct Tax Act section 1063 of the Revised Statutes is made specially applicable to the class of claims thereby created, and that class of claims gets into the Court of Claims by virtue of the act. In other words, they are all referred to the Court of Claims under and pursuant to the provisions of section 1063 of the Revised Statutes, and but for the provision in the act of March 2, 1891, making that section of the Revised Statutes specially applicable to this class of claims and enabling the Secretary to refer them to the Court of Claims under that provision of the Revised Statutes, there would be no jurisdiction in the Court of Claims whatever. But there has been no such provision as this placed in

the act of June 16, 1880, and the Direct Tax Act of 1891, instead of being an argument in favor of the jurisdiction of the Court of Claims over the rights created in the act of June 16, 1880, presents the very converse of the proposition and furnishes the strongest sort of *a fortiori* argument that the Congress in passing the act intended to confine its enforcement strictly to the Interior Department and did not intend that it should in any wise be enforcible in the Court of Claims, for otherwise they would have provided in this act, as they did in the Direct Tax Act, that section 1063 of the Revised Statutes should be made specially applicable to this class of claims, so that they might have been referred to the Court of Claims for adjudication. Certainly, if such had been the intent of the Congress, there would have been placed in the act some means by which resort could be had to the judiciary.

And so the case of *Taylor* v. *The United States* (104 U. S., 216, 222) furnishes no precedent for the contention of the appellant. That claim was founded upon the direct tax statute of August 5, 1861 (12 Stat. L., 292), wherein it was provided that the surplus of the proceeds of the sales of real estate sold for a direct tax due to the United States shall, after satisfying the taxes, costs, charges, and commissions, "be deposited in the Treasury, there to be held for the use of the owner of the property until he or they shall make application therefor to the Secretary of the Treasury, who, upon such application, shall, by warrant on the Treasury, cause the same to be paid to the applicant." And this court held that under such statute there was created in favor

of such applicant a direct trust, against which the statute of limitations did not begin to run until there had been an application made for the payment provided in the statute and a refusal of such payment. In other words, that the statute did not begin to run until there had been a disavowal of the trust. There was no jurisdictional question raised in the case other than this, and with the exception of this question of the statute of limitations, the jurisdiction to entertain the suit was placed upon the doctrine of an implied contract created by the statute. And the case of Lawton (110 U. S., 146), also cited by the appellant, is precisely the same, being a mere affirmance of the doctrines laid down in the Taylor Case. But neither of these cases have any application to the case at bar, for the reason that there is a total dissimilarity between the statute upon which this case proceeds and the act there drawn in question. Here there has been the creation of no trust fund, nor has the faith of the Government been pledged to the payment of any money, nor has there been created any implied contract. The Congress has merely granted a gratuity or generosity to certain persons under certain conditions, whenever due proof of the facts has been made to the satisfaction of the Secretary of the Interior, and to that officer it has left the sole and exclusive power of administering the gratuity created in the act. There was no intention to create any trust fund, or to pledge the faith of the Government to the absolute payment of any money under the notion of a contractural liability to subject the Government to innumerable suits under the notion of a self-confessed indebtedness.

III.

IT HAS ALWAYS BEEN THE POLICY OF THE CONGRESS TO CONFINE THE CONSIDERATION OF QUESTIONS RELATING TO PUBLIC DOMAIN TO THE INTERIOR DEPARTMENT AND TO EXCLUDE THEM, AS FAR AS POSSIBLE, FROM THE CONSIDERATION OF THE COURTS; AND THIS POLICY HAS BEEN FREQUENTLY RECOGNIZED AND UPHELD BY THIS COURT.

The legislative history of the public domain presents a wilderness of statutes in which the untrained wanderer is almost sure to lose his way; and it is entirely safe to say that the many intricate questions of legislative intent, public policy, statutory construction, equitable considerations, the bearing which one decision to one case will have upon the system itself, and the like, with which one is met at the very threshold of an examination of any of these statutes relating to the public lands, can be determined more correctly and more satisfactorily by that Department which for three-quarters of a century has had control of the system and shaped the legislation concerning it than can be done by a judicial tribunal which is unpossessed of this knowledge, skill, and experience.

These considerations have doubtless addressed themselves to the minds of the judiciary as an index to the intent and desire of the Congress to confine in every possible way a consideration of all land questions to the special tribunal which it had created for that purpose. Accordingly, it was early laid down that all questions of fact decided by the General Land Office are binding

everywhere, and that injunction or mandamus proceedings will not lie against its officers. (*Litchfield* v. *Register and Receiver*, 9 Wall., 575; *Raines* v. *Thompson*, 7 id., 347; *Secretary* v. *McGarrahan*, 9 id., 298.)

Although a court of *equity, after the title has passed from the United States and the action concerns the rights of private persons and has naught to do with the Government*, may relieve against mistakes of *law*, in collateral proceedings; yet, even in such a case, "it must" (says the Supreme Court in *Moore* v. *Robbins*, 96 U. S., 530–535) "be *clear* that a mistake of law has been committed, whereby, upon the undisputed facts, land belonging to one man has been given to another."

And the above-quoted language "means" (says the court in *Marquez* v. *Frisbie*, 101 U. S., 473–476), "and it is a sound principle, that where there is a mixed question of law and fact, and the court can not separate it so as to see clearly where the mistake of law is, the decision of the tribunal to which the law has confined the matter is conclusive."

The policy of the Government to confine the consideration of every question concerning the public domain to the Congress and the Department of the Interior, and to exclude the consideration of such questions from the judicial department of the Government, has been fully recognized by this court in numerous cases. For example, in the case of *United States* v. *Jones* (131 U. S., at pp. 15 and 19), this court, speaking through Mr. Justice Bradley, said:

> It is argued, however, that the new law has extended the jurisdiction of the Court of Claims

and the concurrent jurisdiction of the circuit and district courts, or at least the latter, so as to embrace every kind of claim, equitable as well as legal, and specific relief, or a recovery of property as well as a recovery of money. If such is the legislative will, of course the courts must conform to it, although the management and disposal of the public domain, in which the newly claimed jurisdiction would probably be most frequently called into exercise, has always been regarded as more appropriately belonging to the political department of the Government than to the courts, and more a matter of administration than judicature.

* * * * *

Of course, our province is construction only; the policy of the law is the prerogative of the legislative department. But notwithstanding the glowing terms in which able jurists have spoken of the progress of civilization and enlightened government, as exhibited in subjecting government itself, equally with individuals, to the jurisdiction of its own courts, we should have been somewhat surprised to find that the administration of vast public interests, like that of the public lands, which belongs so appropriately to the political department, had been cast upon the courts, which it surely would have been if such a wide door had been opened for suing the Government to obtain patents and establish land claims as the counsel for the appellees in these cases seems to imagine. We are satisfied that the door has not yet been thrown open thus wide.

IV.

IN PASSING THE ACT OF JUNE 16, 1880, IT WAS THE DESIGN AND INTENTION OF THE CONGRESS TO CONFINE THE CONSIDERATION OF THE CLAIMS THEREIN REFERRED TO TO THE INTERIOR DEPARTMENT.

The purpose and intent of Congress to confine the consideration of all questions, of whatever nature, relating to the public lands to the Land Department of the Interior is patent upon the face of every statute that has ever been passed on the subject of public lands; and a better exemplification of this truth can not be found than appears in the legislative history of this very act of June 16, 1880, under which the claimant seeks recovery in this action.

The object and intention of a legislative act is the supreme judicial inquiry. The intention of the legislature is the thing to be enforced by the courts, either affirmatively by giving a remedy, or negatively by denying one. All rules of construction are mere aids to this end. The intent is always the vital part, the essence of the law, the thing to be enforced by the courts. (Sutherland Stat. Con., secs. 234, 235, and cases cited.)

One of the most satisfactory as well as most legitimate ways of ascertaining this Congressional intent is by having reference to the proceedings and debates on the bill in the two Houses of Congress. (See *Blake* v. *National Banks*, 23 Wall., 307; *N. P. R. R. Co.* v. *McRae*, 6 L. D., 400, 402, per Secretary, afterwards Mr. Justice, Lamar.)

THE LEGISLATIVE HISTORY OF THE ACT.

The legislative history of the act of June 16, 1880, is as follows:

The bill (H. R. 3171) was introduced in the House by Mr. Page, of California, January 7, 1880, and was referred to the Committee on Public Lands. (Cong. Rec., vol. 10, part 1, p. 20.)

April 6, 1880, reported favorably, with certain amendments, and referred to the Committee of the Whole. (Cong. Rec., vol 10, part 3, p. 2168.)

May 20, 1880, the bill and amendments were debated and considered as follows (Cong. Rec., vol. 1, part 4, pp. 3594 to 3596, both inclusive):

> The next bill on the Calendar reported from the Committee on the Public Lands was the bill (H. R. No. 3171) for the relief of certain settlers on the public lands, and to provide for the repayment of certain fees and commissions paid on void entries of public lands.
>
> The bill was read, as follows:
>
> "*Be it enacted, etc.*, That in all cases where it shall, upon due proof being made, appear to the *satisfaction of the Secretary of the Interior* that innocent parties have paid the fees and commissions and excess payments required upon the location of claims under the act entitled 'An act to amend an act entitled "An act to enable honorably discharged soldiers and sailors, their widows and orphaned children, to acquire homesteads on the public lands of the United States," and amendments thereto,' approved March 3, 1873, and now incorporated into section 2306 of the Revised Statutes of the United States, which said claims were after such

location, found to be fraudulent and void, and the entries or locations made thereon canceled, the *Secretary of the Interior* is authorized to repay to such *innocent parties* the fees and commissions and excess payments paid by them, upon the surrender of the receipts issued therefor by the receivers of public moneys, out of any money in the Treasury not otherwise appropriated, and shall be payable out of the appropriation to refund purchase-money on lands erroneously sold by the United States.

"SEC. 2. In all cases where homestead or timber-culture or desert-land entries or other entries of public lands have heretofore or shall hereafter be canceled for conflicts, or have been abandoned, or where, from any cause, the entry has been *erroneously* allowed and can not be confirmed, the *Secretary of the Interior* shall cause to be returned to the person who made such entry, or to his heirs or assigns, the fees and commissions, amount of purchase money, and excesses paid upon the same, upon the surrender of the duplicate receipt and the execution of a proper relinquishment of all claims to said land, whenever such entry shall have been duly canceled by the Commissioner of the General Land Office.

"SEC. 3. *The Secretary of the Interior* is authorized to make the payments herein provided for out of any money in the Treasury not otherwise appropriated.

"SEC. 4. *The Commissioner of the General Land Office shall make all necessary rules, and issue all necessary instructions, to carry the provisions of this act into effect.*"

The amendments reported from the Committee on the Public Lands were read, as follows:

"In lines 3 and 4 of section 2, strike out the words, 'or have been abandoned.' At the end of the

second section insert the following words: 'And in all cases where parties have paid double-minimum price for lands which have afterwards been found not to be within the limits of a railroad land grant, the excess of $1.25 per acre shall in like manner be repaid to the purchaser thereof, or to his heirs or assigns.'"

Mr. CONVERSE. I yield the management of this bill to the gentleman from California (Mr. Berry).

Mr. BERRY. Mr. Chairman, this bill, which was introduced by my colleague (Mr. Page), has but one object—to make repayment to parties who have made payment in the shape of fees and double-minimum price for land where the Government has failed to make title to the land or where it has afterwards been ascertained that the lands were not double minimum. This is the only object of the bill, and if properly guarded the measure is manifestly just. The Government certainly should not retain the money of the people, either in the shape of fees or double price, where the Government has failed to pass title. *Section 2362 of the Revised Statutes was intended to cover cases of this kind; but under the construction of the Secretary of the Interior the Department refuses to refund the money in these cases.* I will read section 2362.

"The Secretary of the Interior is authorized, upon proof being made, to his satisfaction, that any tract of land has been *erroneously* sold by the United States, so that from any cause the sale can not be confirmed, to repay to the purchaser, or to his legal representatives or assignees, the sum of money which was paid therefor, out of any money in the Treasury not otherwise appropriated."

Now, he contends before he is authorized to pay back that money it must be for the purchase, and this bill looks to returning fees and commissions

paid to the land offices by the parties when they failed to obtain the title. I suppose perhaps under the present law the Secretary would be authorized to return the excess of payment, but in drawing up this bill *it was the purpose to remove all doubts so the* SECRETARY OF THE INTERIOR *should not construe that section 2362 to apply to the purchase money, but that he might be at liberty to return fees and commissions.*

There were under what is known as "the bounty and homestead law for soldiers" many fraudulent warrants issued. The law provided where a soldier had taken less than 160 acres as a homestead he might enter an additional quantity to make up, in addition to what he had already taken, 160 acres. Many fraudulent pieces of scrip or warrants were issued in excess, and fees and commissions were paid on those fraudulent warrants. This bill aims to return those fees and commissions paid upon warrants found to be fraudulent, and which have been canceled. The object of the measure is, Mr. Chairman, that where the party who has honestly entered land upon those fraudulent warrants, and where they have lost the land, they ought not to be required to lose also the fees and commissions paid to the Government. If the bill is properly guarded, it is manifestly just.

I will now yield to my colleague (Mr. Page), who originally introduced the bill into the House.

Mr. BOUCK. The gentleman from California says "fees paid to the Government." Now, are they paid to the Government or to the Land Office?

Mr. BERRY. To the Land Office.

Mr. BOUCK. The Government never got the fees.

Mr. PAGE. Yes; I say they have been paid to the Government. The Clerk will please read the report.

The Clerk read as follows:

"Mr. Berry, from the Committee on the Public Lands, submitted the following report (to accompany bill H. R. No. 3171):

"The Committee on the Public Lands, to whom was referred bill H. R. No. 3171, have considered the same, and report as follows:

"The object of the bill is to refund to innocent purchasers of public lands all moneys they have paid the Government as fees and commissions, and excess purchases where, from any cause, the Government fails to make title. The bill as amended also provides that in cases where parties have been required to pay double minimum price for lands supposed to be within railroad reservations, and it afterwards proved not to be within said reservations, and was not double minimum, *upon due proof being made the Secretary of the Interior* shall refund the extra $1.25.

"Your committee think the bill properly guarded and its object manifestly just. The Government should certainly refund the money to the parties to whom it justly belongs, and has no right to retain money for which it gave nothing. Your committee therefore recommend the passage of this bill with the amendments proposed."

Mr. PAGE. I do not desire, Mr. Chairman, to detain the committee with any speech.

The first section of this bill, as it will be observed, provides that in all cases where it shall, upon due proof being made, to appear to the satisfaction of the *Secretary of the Interior* that innocent parties have paid the fees and commissions and excess payments required upon the location of claims under the act entitled, etc., he shall refund the money so paid.

The second section provides that in all cases where homestead or timber-culture or desert-land entries

or other entries on public lands have been canceled for conflict, or where from any cause the entry has been erroneously allowed, the fees paid into the Land Office, which have afterwards gone into the Treasury of the United States, may be refunded to those parties.

Of course, if the members of this committee will reflect for a moment, they will see it is unjust to those parties that the Government should retain their money when they have had no value for it in a single instance. The money was paid as fees and commissions to the registers and receivers of the Land Office. When they came here it was found the entries had been erroneously allowed, and the Government could not comply with the conditions of the law, and therefore it is wrong that these people should lose the fees and commissions paid by them.

Under what is known as the additional homestead act for soldiers, it was found soon after its passage there were thousands of fraudulent certificates issued. Innocent parties purchased them in good faith and undertook to locate lands under them. In course of time they were rejected, and these innocent parties lost not only the money paid for the fraudulent certificates, but also the fees and commissions they had paid into the General Land Office.

Mr. DUNNELL. Does the gentleman refer to the soldiers' homestead act?

Mr. PAGE. Yes, sir; you remember we repealed the law simply because of the immense frauds practiced on the people of the country under it. Men in good faith purchased those certificates, and attempted to locate lands under them. They paid commissions and fees, but it was afterwards shown in many instances they were fraudulent and were forgeries on their face.

This bill simply provides when, *in the judgment of the Secretary of the Interior, proof shall be made to justify* HIM in refunding money thus unjustifiably paid, he shall so refund it. There is no law by which you can reach it now, because the money has gone into the Treasury, and can only be drawn out again by an act of Congress.

Mr. BERRY. One word more. *One feature of the bill is to refund the extra dollar and a quarter where the amount was supposed to be double minimum when the Government sold it and the price $2.50 per acre was paid, but which was afterwards ascertained not to be double-minimum land.* This $1.25 per acre lies in the Treasury of the United States, and properly belongs to the men who paid it into the Treasury. *There is no means by which you can get it. There have been from time to time special bills presented to refund money in certain cases and to certain individuals, and the committee deemed it better to frame a general law to cover all these cases.*

Now, I ask the adoption of the amendment proposed by the committee.

Mr. LOUNSBERY. Before that I would like to ask the gentleman from California a question.

Mr. BERRY. Certainly.

Mr. LOUNSBERY. Can the gentleman refer to any opinion of the Secretary of the Interior in which it is held that he has not the power to refund money under the section of the statute which has been read here where a double-minimum price has been paid and double-minimum lands have not been granted?

Mr. BERRY. I do not know that I can refer directly to any written opinion of the Commissioner or the Secretary of the Interior, but I called upon the Commissioner myself, and he informed me that he could not refund this money for the reason, I

believe it was, that at the time of the sale the Government regarded that as a double minimum. I have not a written opinion and do not know that I remember exactly the reason, but that was the substance of it; and besides, he said he did not find anything in the law to warrant him in refunding the money. I framed a general bill myself, which I have now in my possession, to cover these cases.

Mr. LOUNSBERY. The question I put is whether you can refer to any opinion of the Secretary of the Interior in reference to this subject where the Government has refused to refund the difference between the double-minimum price of the land and the real value of the land.

Mr. BERRY. I can refer the gentleman to parties who made application to the Department and who received that information in response to their applications. There is no authority of law to pay it out of the Treasury.

Mr. LOUNSBERY. But the statute which has been read authorizes the Secretary of the Interior to pay it.

Mr. BERRY. I think it has been held differently in the Department.

Mr. PAGE. No; there is no law by which it can be paid. I would like to ask my colleague from California a question, and that is whether this bill has not been prepared or favorably recommended by the Commissioner of the General Land Office.

Mr. BERRY. I am not able to answer that exactly, but I had a conversation myself with him, and he recommended its passage.

Mr. HERBERT. If the gentleman from California will permit me, I can answer the question of the gentleman from New York. I made application myself to have refunded quite a number of entries

that were canceled some twenty years ago because of a conflict with a railroad grant. The Secretary of the Interior or the Commissioner of the General Land Office had held that these lands were not subject to entry; that they were improperly permitted to be entered, and thereupon had canceled them; but because the entries had been canceled more than two years prior to the time that the application was made for refunding the purchase money, the Secretary of the Interior and the Commissioner of the General Land Office, under some decision of the Secretary of the Treasury which they regarded as binding in such cases, held that the applicants could not be paid without a special appropriation by law. I do not now remember the section of the Revised Statutes upon which the Secretary of the Treasury based his ruling, but such was the ruling.

Mr. LOUNSBERY. It was based, then, I presume, on the statute of limitations, two years having elapsed. The same ruling would apply here if this bill passed.

Mr. HERBERT. No, sir; not the statute of limitations, but some other statute that affected it; but what it was I do not now remember. I desire to offer an amendment at the close of this bill to cover just such cases.

Mr. BERRY. I now ask a vote upon the amendment.

The CHAIRMAN. The clerk will read the amendment proposed by the committee.

The Clerk read as follows:

"It is proposed to strike out the words 'or have been abandoned' in lines 3 and 4 of section 2, so that it will read: 'or shall hereafter be canceled for conflict, or where from any cause.'" etc.

The amendment was agreed to.

The CHAIRMAN. The clerk will read the next amendment.

The Clerk read as follows:

"Add to line 12, at the end of section 2, the following: 'And in all cases where parties have paid double-minimum price for land which has afterward been found not to be within the limits of a railroad land grant, the excess of $1.25 per acre shall in like manner be repaid to the purchaser thereof, or to his heirs or assigns.'"

The amendment was agreed to.

Mr. HERBERT. I ask now to offer this amendment, to come in at the close of the bill:

"And for the repayment of the purchase money and fees herein provided for *the Secretary of the Interior shall draw his warrant on the Treasury*, and the same shall be paid without regard to the date of the cancellation of the entries."

The CHAIRMAN. Is this intended to be inserted as a separate section?

Mr. HERBERT. No, sir; to add to the fourth section, at the end of the bill.

The amendment was agreed to.

Mr. BENNETT. I suggest that the title should be amended by inserting after the word "fees" the word "purchase-money," so that it will read, "for the relief of certain settlers on the public lands, and to provide for the repayment of certain fees, purchase-money, and commissions," etc.

The CHAIRMAN. The Chair would suggest that this amendment should properly be made in the House. The title can be amended there.

Mr. BERRY. I now move that the bill be laid aside to be reported favorably to the House.

The motion was agreed to; and the bill was accordingly laid aside to be reported to the House with favorable recommendation.

May 21, 1880, the bill, with the foregoing amendments, was passed by the House. (Cong. Rec., vol. 10, part 4, p. 3632.)

May 22, 1880, the bill as amended was referred to the Senate Committee on Public Lands. (Cong. Rec., vol. 10, part 4, p. 3652.)

May 26, 1880, reported back to the Senate by the committee without amendment. (Cong. Rec., vol. 10, part 4, p. 3793.)

June 14, 1880, passed by the Senate after the following explanation (Cong. Rec., vol. 10, part 5, p. 4513):

> The bill (H. R. No. 3171) for the relief of certain settlers on the public lands, and to provide for the repayment of certain fees, purchase money, and commissions paid on void entries of public lands, was considered as in Committee of the Whole.
>
> The bill was reported to the Senate without amendment.
>
> Mr. ANTHONY. I think this bill of sufficient importance to require some explanation from the Senator who has it in charge.
>
> Mr. PLUMB. I think I can explain it, perhaps, to the satisfaction of the Senator from Rhode Island, although it is in charge of the Senator from California (Mr. Booth), who is now temporarily absent.
>
> The first section applies to a class of entries which were made upon what are known as soldiers' additional homestead locations. The habit or rule of the Department required those papers of locations to be sent to the Commissioner of the General Land Office to be by him certified as correct. He did so certify them, and in a great many cases where the papers were fraudulent, through no mistake of the parties who presented them, through no fraud on

their part, but through a mistake of his own, and through a fraud of parties who had originally gotten up the papers and sold them to innocent persons. Those papers were then located upon public lands. Afterwards, the fraud being discovered, those locations were set aside. These persons, acting upon the faith of the certification by the Commissioner of the General Land Office, on making their entries paid certain fees, innocently paid them of course, because they paid them on the faith of the certification of the Commissioner that the papers were all right. The entries were of course set aside, and these persons have not had refunded to them, as they ought to have had, the fees they paid for those locations.

The second section refers to a class of cases which frequently arise in the administration of the laws with regard to the public domain where errors occur. A person is erroneously permitted to enter a quarter section of land and pays for it. In a large number of these cases the Department holds under the law as it now stands that it can not refund the amount, notwithstanding the party who makes the entry does not get the land he pays the money for. It occurs frequently in town-site entries, where the lands are discovered subsequently to have been withdrawn for railroad purposes. It occurs, too, that private parties have made preemption entries upon lands of a similar character. There is a great mass of cases where erroneous entries are made from misdescriptions of lands, and so on.

Mr. PADDOCK. And where the local land officers themselves are responsible for the errors, and not the parties making the entries.

Mr. PLUMB. Whether they are responsible solely or not, at all events they are responsible, because they permit entries to be made that it subsequently

turns out should not have been made, and inasmuch as the settler or person seeking to make the entry depends on the local office for his information in regard to the character of the land—that is to say, that it is land which he may properly enter—it is perhaps primarily the error of the land office. In all these cases the Government gets from these innocent persons fees, and in many cases the price of the land, which it religiously holds on to and does not pay back, as it ought to do. This second section is for the purpose of compelling repayment.

June 16, 1880, bill approved by the President.

[NOTE.—The *italics*, employed for obvious reasons, are my own.]

From the foregoing legislative history it is entirely clear that the Congress not only did *not* intend to invest the courts with any jurisdiction over the subject-matter of this act, but, on the contrary, that the act was passed for the very purpose of confining the matters therein treated to the *exclusive* cognizance of the Secretary of the Interior and the Commissioner of the General Land Office, and of *preventing* them from becoming the subjects of litigation in the courts.

This is shown by the entire absence of all mention of or reference to the courts, not only in the act itself, but also in any offered amendment or in anything said in the progress of the debates on the bill. And this nonallusion to the courts is especially significant, when we remember that this statute is a declaratory one, of a remedial character, passed for the purpose of setting at rest the doubts entertained and the limitations placed upon section 2306 of the Revised Statutes by the *Secretary of the*

Interior, which said former statute related *wholly and exclusively* to the powers and duties of that officer. In introducing it, the author of the bill said that "section 2362 of the Revised Statutes was intended to cover cases of this kind, but under the construction of the *Secretary of the Interior* the Department refuses to refund the money in these cases." He then reads said section 2362, states the character of the Secretary's objection, and continues:

> I suppose, perhaps, under the present law the Secretary would be authorized to return the excess of payment, but in drawing up this bill *it was the purpose to remove all doubts*, so that the *Secretary of the Interior* should not construe, etc.

If it had been the intention to invest the courts with jurisdiction, if there had been any purpose to test the correctness of the Secretary's construction of the former law, would not the Congress have provided for it? Would there not, at least, have been some suggestion to that effect by some one during the six months that this bill was pending before the Congress? There was no such intent; there was no such purpose. On the contrary, the act was passed, and it is so stated by its author, for the express purpose of confining these matters to the Interior Department and of keeping them out of the courts.

This truth is further manifested by the language employed and the spirit manifested in every section of the act.

In the first section it is provided that "in all cases where it shall, upon due proof being made, appear to the satisfaction of the Secretary of the Interior * * * the Secretary of the Interior is authorized to repay," etc.

In the second section it is provided that "the Secretary of the Interior shall cause to be repaid," etc.

Section 3 is as follows:

> The Secretary of the Interior is authorized to make the payments herein provided for out of any money in the Treasury not otherwise appropriated.

Section 4 is as follows:

> The Commissioner of the General Land Office shall make all necessary rules and issue all necessary instructions to carry the provisions of this act into effect; and for the payment of the purchase money and fees herein provided for the Secretary of the Interior shall draw his warrant on the Treasury and the same shall be paid without regard to the date of the cancellation of the entries.

The language of this statute, therefore, is not general, but special, and limited to the Secretary of the Interior and the General Land Office. But even if it had been general, it should be remembered that language, though apparently general, may be limited in its operation and effect, where it may be gathered from the object and purpose of the whole statute that the language was designed to apply only to certain persons or things or was to operate only under certain conditions or be enforced only by certain officers. (*McKee* v. *United States*, 164 U. S., 287, 293. *Jones* v. *Jones*, 18 Maine, 308; *Murray* v. *Gibson*, 15 How., 421; *Brewer* v. *Blanger*, 14 Peters, 198; *United States* v. *Saunders*, 22 Wall., 492; *Torrence* v. *McDougall*, 12 Georgia, 526; *Greenhow* v. *James*, 80 Va., 636, 641.)

V.

THE CONTEMPORANEOUS AND UNIFORM CONSTRUCTION PLACED UPON THE ACT OF JUNE 16, 1880, BY THE SECRETARY OF THE INTERIOR WILL NOT BE DISTURBED BY THE COURT.

Shortly after the passage of the act of June 16, 1880, and in numerous cases since then, it has been held by the Secretary of the Interior that the repayment provided for in the third section of said act only applied to lands which were sold at the double minimum price, supposing them to be within the limits of the railway grant at the time of the sale, but which were afterwards discovered not to have been within the limits of a railroad grant at the time of the sale and consequently not chargeable at double minimum rates; but whenever an application for repayment under this act has been made, where the facts were that at the time the lands were sold they were actually within the limits of a railroad grant and therefore the price of $2.50 an acre properly charged therefor, such application has been uniformly denied—the Secretary holding that the provisions of this act only applied where the double minimum price was erroneously charged. (See Texas Pacific Grant, 8 L. D., 530; Jacob A. Gilford, id., 583; George G. Foster, 12 L. D., 316; Medbury, 25 L. D., 308.)

It is well settled by the decisions of this court that the contemporary and uniform construction placed upon a statute by the executive department which is charged with its execution is entitled to the greatest respect and will not be overturned by the courts, unless it is

clearly erroneous. (*Edwards* v. *Darby*, 12 Wheat., 206; *United States* v. *Filbrick*, 120 U. S., 52, 59; *Hahn* v. *United States*, 107 U. S., 405; *Brown* v. *United States*, 113 U. S., 571; *Robertson* v. *Downing*, 127 U. S., 608, 613; *United States* v. *Healy*, 160 U. S., 136, 141.)

In *United States* v. *Moore* (95 U. S., 760, 763), this court said:

> The construction given to a statute by those charged with the duty of executing it * * * ought not to be overruled without cogent reasons. * * * The officers concerned are usually able men and masters of the subject. Not infrequently they are the draftsmen of the laws which they are afterwards called upon to interpret.

And where the construction placed upon the law has controlled the conduct of the public business for many years, this court has uniformly declined to upset that construction in any case in which it did not manifestly appear that the construction placed upon the statute by the Department was clearly erroneous and could not be upheld.

VI.

THE CONSTRUCTION PLACED BY THE SECRETARY OF THE INTERIOR UPON THE ACT OF JUNE 16, 1880, IS A CORRECT INTERPRETATION OF THE LAW.

In passing the act of June 16, 1880, the Congress did not design or intend to provide for a wholesale repayment of one-half of the purchase money for public lands whenever, in the course of subsequent events, it should transpire that from any cause or at any time the lands purchased by the entrymen should cease to be within the

limits of a railway grant, but, on the contrary, only intended to provide for a repayment where the lands were charged for at double minimum price, when, in fact, at the time of the sale they were not within the limits of a railroad grant, and therefore the price was erroneously charged. This proposition is apparent upon the face of every report made upon the bill during its pendency in Congress and by the remarks of every member of both Houses of Congress during the consideration of the bill, either in committee or in open session, as is clearly shown by the complete legislative history of the bill which we have printed in this brief. For example, when the bill was reported to the House from the Committee on Public Lands, Mr. Berry, in explaining the measure, has this to say of the third section of the bill, which forms the subject-matter of this claim :

> *One word more. One feature of the bill is to refund the extra $1.25 where the amount was supposed to be double minimum when the Government sold it, and the price $2.50 an acre was paid, but which was afterwards ascertained not to be double minimum land.* This $1.25 per acre lies in the Treasury of the United States, and properly belongs to the men who paid it into the Treasury; there is no means by which you can get it. There have been from time to time special bills presented to refund money in certain cases and to certain individuals, and the Committee deem it better to frame a general law to cover all these cases.

And a like explanation was made concerning the first and second sections of the bill by Mr. Page, and [illegible] is running through the whole proceedings, whether in committee or in open session, a manifest intent to pro-

vide only for repayment where the price had been erroneously charged as double minimum, when, as a matter of fact, the land was single minimum land. The money having been paid into the Treasury, there was, of course, no way of getting it out, even though there was confessedly a mistake and the money rightfully belonged to the person who paid it, and it was to enable this money to be paid back under circumstances of error of this sort that this bill was framed, authorizing and directing the Secretary to draw his warrant therefor directly upon the Treasury, and providing that the same should be paid out of any moneys not otherwise appropriated.

But there is not in the whole legislative history of this bill the slightest suggestion that it was the intent of the Congress to frame a law which would entitle the entryman or purchaser of public land at any indefinite time in the future to claim a return of one-half of its purchase price because of the happening of some contingent event whereby his land ceased to be within the limits of a railroad grant. Such a bill would be contrary to the policy of all of the laws ever passed by the Congress on this subject, and would subject the Government to an enormous monetary loss never contemplated by the framers of this bill. The purpose of this act was for the correction of errors, to provide for repayment where it was shown that the land was erroneously charged for at $2.50 per acre when, by reason of the fact that it was not at the date of sale within the limits of a railroad grant, it should have been rated at $1.25 per acre. And it is this intent of the legislature that will be enforced by this court in the interpretation of the law, and to this end the

court will not be hampered by any inaccuracy or inappropriateness in the language of the bill. As was said by Mr. Chief Justice Taney in *Brewer* v. *Blougher* (14 Peters, 178, at p. 198), recently quoted and followed by this court, speaking through Mr. Justice Peckham, in *McKee* v. *The United States* (164 U. S., 287, at p. 293):

> It is undoubtedly the duty of the court to ascertain the meaning of the legislature from the words used in the statute and the subject-matter to which it relates, and to restrain its operation within narrower limits than its words import if the court are satisfied that the literal meaning of its language would extend to cases which the legislature never designed to embrace in it.

Giving effect to this rule of interpretation, this court will construe the act of June 16, 1880, in accordance with the manifest intent of the Congress, and to this end will change the tense of the verb "to be" in said act so that it shall read, "and in all cases where parties have paid double minimum price for land which has afterwards been found not to have been within the limits of a railroad grant at the date of purchase or entry, the excess of $1.25 per acre shall in like manner be repaid to the purchaser thereof, or to his heirs or assigns."

It is therefore submitted that in any event the judgment of the court below is without error, and the same should be affirmed.

GEORGE HINES GORMAN,
Special Attorney.

L. A. PRADT,
Assistant Attorney-General.

APPENDIX.

[Court of Claims. No. 18108. (Decided February 1, 1897.) George C. Foster *v.* The United States.]

OPINION.

NOTT, Ch. J., delivered the opinion of the court:

The petition in this case alleges that in December, 1886, the claimant entered a quarter of a section of land in the State of Oregon and within the boundaries of a grant to the Northern Pacific Railroad Company; that he paid $2.50 per acre for the land contained in his entry; that it was part of an even section raised in price to the double minimum by reason of the railroad land grant; that the railroad company never definitely fixed the line of the road as required by the statute authorizing the grant, or file a plat thereof, or construct the road within the time prescribed by law; and that in consequence of this default Congress passed the *Act 29th September, 1890* (26 Stat. L., p. 496), forfeiting the grant and declaring all lands so forfeited part of the public domain. The petition also alleges that the claimant has applied to the Commissioner of the General Land Office for the repayment of $1.25 per acre under the provisions of the second section of the act of June 16, 1880, which provides that "in all cases where parties have paid double minimum price for land which has afterwards been found not to be within the limits of railroad

land grant, the excess of $1.25 per acre, shall in like manner be repaid to the purchaser thereof, or to his heirs or assigns." It is also alleged that the Commissioner transmitted the application to the Secretary of the Interior, who, on the second of April, 1891, denied the application.

To this petition the defendants have demurred, on the ground that the cause of action is not within the jurisdiction of the court. The reason assigned for this by the defendants is that the remedy afforded the claimant by the act 16th June, 1880, is exclusive.

This act for the relief of certain settlers on the public lands, and to provide for the repayment of certain fees, purchase money, and commissions paid on void entries of public lands (21 Stat. L., p. 287), enacts that "in all cases where it shall, upon due proof being made, appear to the satisfaction of the Secretary of the Interior that innocent parties have paid the fees and commissions and excess payments required upon the location of claims," etc., "the Secretary of the Interior is authorized to repay to such innocent parties the fees and commissions and excess payment paid by them," etc.

The statute also enacts (sec. 2) that where entries "shall hereafter be canceled for conflict, or where, from any cause, the entry has been erroneously allowed and can not be confirmed, the Secretary of the Interior shall cause to be repaid to the person who made such entry, or to his heir or assigns, the fees and commissions, amount of purchase money and excesses paid upon the same," etc., "and in all cases where parties have paid double-minimum price for land which has afterwards been found not to be within the limits of a railroad land grant, the excess of $1.25 per acre shall in like manner be repaid." The Secretary of the Interior is authorized to make the payments out of any money in the Treasury not otherwise appropriated; and the Commissioner of

the General Land Office is to make all necessary rules to carry the provisions of the act into effect.

In support of the demurrer the counsel for the Government contends that where a right is given by statute and a specific remedy provided, the right can be vindicated in no other way than that prescribed by the act; that if the statute gives a remedy in the affirmative without a negative, express or implied, for a matter actionable at common law, the party may sue at the common law as well as upon the statute; but when a right is solely and exclusively of legislative creation, such as the right conferred by this act of June 16th, 1880, then jurisdiction is limited to the particular tribunal provided for its enforcement, and jurisdiction can be exercised and the remedy pursued only in the precise forum and in the exact manner provided in the statute. The counsel for the claimant contends that the action can be maintained in this jurisdiction because the claim which is its subject is founded upon a law of Congress. It is urged that a right has been created by Congress which should not be permitted to fail by reason of the opposition of the officer whose duty it is to carry out the will of Congress. The cases of the *United States* v. *Taylor*, 104 U. S. R., 216; *United States* v. *Kaufman*, 96 *id.*, 567, and others are relied upon to sustain this position.

The grant of jurisdiction to this court of all claims founded upon any act of Congress (Rev. Stat., sec. 1059; the *Tucker Act*, 1887, 24 Stat. L., p. 505, sec. 1) is broad and general in terms and at first sight seems to include every claim created by statute; but at an early day it was held that this grant of jurisdiction did not extend to cases for which a specific jurisdiction had been provided by an earlier statute. (*Nicoll's Case*, 7 Wall. R., 122.) Since then many questions have arisen relating to these exceptions to jurisdiction and to exceptions to the

exceptions; and many decisions have consequently been rendered. They may be classified as follows:

1. Where Congress create a class of claims, such as the customs cases, the internal-revenue cases, the pension cases, and provide a jurisdiction for the ascertainment and allowance of such claims, that jurisdiction is exclusive. (*Nicoll's Case*, 7 Wall., 122; *Turner's Case*, 9 C. Cls. R., 367; *Boughton's Case*, 12 C. Cls. R., 330; *Ramsey's Case*, 14 id., 367; *Kellogg's Case*, 15 id., 372; *Mayes, admr.*, v. *United States*, 12 Wall., 177; *Daily's Case*, 17 C. Cls. R., 144.)

2. But where the officer clothed with authority to investigate and allow determines the facts of a case and refers it to this court for the determination of a question of law thereby presented, or where the officer, having allowed a claim, transmits it to the accounting officers for payment and they, or the Secretary of the Treasury, refuse to give effect to the award, an action thereon will lie in this court. (*Kaufman's Case*, 11 C. Cls. R., 659; affirmed, 96 U. S. R., 567; *Stotesbury's Case*, 23 C. Cls. R., 285; affirmed, 146 U. S. R., 196; *Brigg's Case*, 15 C. Cls. R., 48; *Bank of Greencastle's Case*, 15 *ib.*, 225; *Real Estate Savings Bank's Case*, 16 C. Cls. R., 335; affirmed, 104 U. S. R., 728; *Nixon's Case*, 18 C. Cls. R., 448; *Dupasseur's Case*, 19 *id.*, 1; *Sybrandt's Case*, 19 *ib.*, 461; *Ramsey's Case*, 21 *id.*, 443; *Horton's Case*, 31 *id.*, 148.)

3. Where Congress create a class of claims, such as for horses and vessels lost and destroyed in the military service, and refer the claims for investigation and settlement to the accounting officers of the Treasury, no jurisdiction to finally determine a legal right is created, and the accounting officers act simply in their usual capacity of auditing officers, and this court has jurisdiction of the claims. (*Powell's Case*, 1 C. Cls. R., 400; *Bogert's Case*, 3 *id.*, 18; *Shaw's Case*, 9 *id.*, 388; affirmed, 93 U. S. R., 235; *New Mexico Horse Cases*, 16 *id.*, 550, 559.)

4. Where Congress create a class of claims, such as claims for a surplus in the Treasury derived from property sold for taxes, or the direct-tax cases, with directions to the Secretary of the Treasury to pay the amount found to be due to the persons entitled thereto, no special jurisdiction is thereby created and an action will lie in this court. (*Irene Taylor's Case*, 14 C. Cls. R., 339; affirmed, 104 U. S. R., 216; *Sams's Case*, 27 C. Cls. R., 266; affirmed in *McKee's Case*, 164 U. S. R., 287; *Glover's Case*, *ib.*, 294; *Elliott's Case*, 373.)

5. Where Congress pledge the faith of the United States in consideration of a person doing some act such as that in the drawback cases, or in the sugar-bounty cases, presenting thereby an obligation in the nature of an implied contract, the action of the Secretary of the Treasury, or the revenue officers, is not conclusive, and an action will lie upon the statutory obligation of the Government. (*Campbell's Case*, 107 U. S. R., 407; *Glynn's Case*, 32 C. Cls. R., —; *United States* v. *Realty Co.*, 163 U. S. R., 427; *Swift's Case*, 105 *id.*, 691; *Swift's Case*, 111 *id.*, 22.)

If in the case now before the court there had existed a right of action at common law, or a claim created by some statute anterior to the act of June 16th, 1880, the proceedings prescribed by that act before the Interior Department would be regarded as an auxiliary remedy—as a quick and simple proceeding to enable claimants speedily to procure redress. But the court is of the opinion that no such right existed. The claimant's land was within the purview of a railroad grant at the time of his purchase; the statute fixed the price of such land at $2.50 per acre; both parties regarded $2.50 per acre as the value of the land at that time and in its then condition, and the Government did not guarantee performance on the part of the railroad grantee. When Congress annulled the grant and the reserved sections

dropped back into the public domain, it was the result of the railroad company's inaction, and not an act of voluntary interference on the part of the Government.

If the claim was created exclusively by the act of 1880, it seems equally clear to the court that the case comes within the first subdivision of jurisdictional cases above set forth; that the statute provided a forum for the prosecution of the claim; that that forum was not intended to be auxiliary, and that it must be held to have exclusive jurisdiction of these claims. As was said by the Supreme Court in the Nicoll Case, the means afforded by the statute for obtaining redress "constitute a system," and the claimants whose rights depend entirely upon that statute can obtain redress only by the means which it has provided.

The judgment of the court is that the demurrer be sustained and the petition of the claimant be dismissed for want of jurisdiction.

MEDBURY *v.* UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

No. 225. Argued March 17, 1899. — Decided April 3, 1899.

Under the act of June 16, 1880, c. 244, the Court of Claims has jurisdiction of an action to recover an excess of payment for lands within the limits of a railroad grant, which grant was, after the payment, forfeited by act of Congress for nonconstruction of the road.

When in such case, by reason of the negligence of the railroad company for many years to construct its road, Congress enacts a forfeiture of the grant, the Government is under no obligation to repay the excess of price paid by the purchaser of such lands in consequence of their being within the limits of the forfeited grant.

THE appellant herein filed her petition in the Court of Claims and sought to recover judgment by virtue of the provisions of the act approved June 16, 1880, c. 244, 21 Stat. 287.

The Attorney General denied all the allegations of the petition, and the case was tried by the court upon the following agreed statement of facts: Congress made a grant of lands to the Wisconsin Central Railroad Company by the act of May 5, 1864, c. 80, 13 Stat. 66, which contained the condition that the railroad should be built as therein provided. After the grant the price of the lands reserved within its place limits was raised from $1.25 per acre to $2.50 per acre under the authority of law and by the direction of the Secretary of the Interior. In 1872, one Samuel Medbury made an entry of more than seven thousand acres of land, within the place limits of that grant and at the double minimum price of $2.50

per acre, and he died in 1874, leaving his widow, the appellant herein, and a son and daughter, who subsequently conveyed to the appellant all their interest in the claim herein made.

The conditions upon which the grant of lands was made to that particular section of the proposed railroad were never complied with and the proposed railroad was never constructed, for which reason the grant was by the act of Congress of September 29, 1890, c. 1040, 26 Stat. 496, forfeited to the United States. By reason of this failure to build the railroad, and because of the forfeiture of the land grant by Congress, the lands purchased by Medbury ceased to be alternate sections of land within a railroad land grant, although they were such when he purchased them. Thereafter, and on the 14th of November, 1894, Lucetta R. Medbury, as the widow and heir of Samuel Medbury, made application to the Secretary of the Interior for the repayment of the excess of $1.25 per acre upon the seven thousand and odd acres of land entered by her husband, the application being made under the second section of the act of June 16, 1880, c. 244, 21 Stat. 287, and on October 5, 1897, the application was denied by the Secretary. Upon these findings of fact the Court of Claims decided, as a conclusion of law, that the petition should be dismissed for want of jurisdiction. From that decision the claimant has appealed to this court.

Mr. Russell Duane and *Mr. Harvey Spalding* for appellant. *Mr. E. W. Spalding* was on the brief.

Mr. George Hines Gorman for appellees. *Mr. Assistant Attorney General Pradt* was on his brief.

Mr. Justice Peckham, after stating the facts, delivered the opinion of the court.

Two questions arise in this case: (1) Whether the Court of Claims had jurisdiction of the claim; and (2) if it had, what is the true construction of the act of June 16, 1880, requiring the repayment to the purchaser, of the excess of $1.25 per acre

where the land purchased has afterwards been found not to be within the limits of a railroad land grant.

The ground upon which the learned Court of Claims decided that it had no jurisdiction in the case was that the remedy afforded by the act of 1880 to obtain the repayment of the excess of the price was exclusive of any other. Thus if the Secretary of the Interior erroneously construed the act and refused payment in a case where the claimant was justly entitled thereto, under its provisions, the claimant would be without redress, even though there were no dispute in regard to the facts, and the decision of the Secretary was a plain mistake in regard to the law. In this construction as to the jurisdiction of the Court of Claims, we are unable to agree.

The first section of the act of June 16, 1880, does not refer to such a case as this. Section 2 of that act reads in full as follows:

"In all cases where homestead or timber culture or desert land entries or other entries of public lands have heretofore or shall hereafter be cancelled for conflict, or where, from any cause, the entry has been erroneously allowed and cannot be confirmed, the Secretary of the Interior shall cause to be repaid to the person who made such entry, or to his heirs or assigns, the fees and commissions, amount of purchase money and excesses paid upon the same, upon the surrender of the duplicate receipt and the execution of a proper relinquishment of all claims to said land, whenever such entry shall have been duly cancelled by the Commissioner of the General Land Office, *and in all cases where parties have paid double minimum price for land which has afterwards been found not to be within the limits of a railroad land grant, the excess of one dollar and twenty-five cents per acre shall in like manner be repaid to the purchaser thereof, or to his heirs or assigns.*"

Section 3 authorizes the Secretary of the Interior to make the payments provided for in the act out of any money in the Treasury not otherwise appropriated, and by section 4 the Secretary is authorized to draw his warrant on the Treasury in order to carry the provisions of the act into effect.

The portion of section 2, which is in italics, is the part of the act upon which this claim is founded. The question is whether the Court of Claims has jurisdiction in this case upon the facts found.

By the act of March 3, 1887, c. 359, 24 Stat. 505, the Court of Claims is given jurisdiction to hear and determine, among other things, all claims founded upon any law of Congress. As the claim in this case is founded upon the law of Congress of 1880, it would seem that under this grant of jurisdiction the Court of Claims had power to hear and determine the claim in question. The act of 1887 was not, however, the first act giving jurisdiction to the Court of Claims in regard to a law of Congress. It had the same power when the case of *Nichols* v. *United States*, 7 Wall. 122, was decided, and a question of jurisdiction arose in that case. It there appeared that Nichols & Company were merchants in New York, and they made in 1847 an importation from abroad upon which duties were imposed on the quantity invoiced. The importation consisted of casks of liquor, and a portion of the liquor had leaked out during the voyage, and was thus lost, and consequently was never imported in fact into the United States. Notwithstanding these circumstances Nichols & Company paid the duties as imposed under the invoice, and without any deduction for leakage, and made no protest in the matter. An act of Congress of February 26, 1845, provided that no action should be maintained against any collector to recover duties paid unless a protest had been made in writing and signed by the claimant at the time of the payment. Where a protest had been made the importer could thereafter bring a suit against the collector for a recovery of the money so paid, and the suit would be tried in due course of law. The importers having made no protest, and being therefore unable under the provisions of the law to bring suit against the collector, brought suit in the Court of Claims to recover back the overpayment, upon the ground that the court had power to hear and determine all claims founded upon any law of Congress, or upon any regulation of the executive department, or upon any contract, express or implied, with the Government of the

United States. This court held that the Court of Claims had no jurisdiction, and in the course of the opinion of the court, which was delivered by Mr. Justice Davis, and in giving the grounds upon which the court denied jurisdiction, it was said:

"Congress has from time to time passed laws on the subject of the revenue, which not only provide for the manner of its collection, but also point out a way in which errors can be corrected. These laws constitute a system which Congress has provided for the benefit of those persons who complain of illegal assessments of taxes and illegal exactions of duties. In the administration of the tariff laws, as we have seen, the Secretary of the Treasury decides what is due on a specific importation of goods, but if the importer is dissatisfied with this decision, he can contest the question in a suit against the collector, if, before he pays the duties, he tells the officers of the law, in writing, why he objects to their payment."

And again the court said:

"Can it be supposed that Congress, after having carefully constructed a revenue system, with ample provisions to redress wrong, intended to give to the taxpayer and importer a further and different remedy? The mischiefs that would result, if the aggrieved party could disregard the provisions in the system designed expressly for his security and benefit, and sue at any time in the Court of Claims, forbid the idea that Congress intended to allow any other modes to redress a supposed wrong in the operation of the revenue laws, than such as are particularly given by those laws."

The system spoken of in the opinion provided a general scheme for the collection of the revenue, and also provided adequate means for the correction of errors by a resort to a suit in a court of law prosecuted in the ordinary way. While it gave rights, it provided a special but full and ample remedy for their infringement. It certainly could never be presumed that Congress, while thus furnishing an adequate method for the correction of errors, intended that the party aggrieved might refuse to follow such remedy and resort to some other and different mode of relief. It is quite plain that the remedy thus specially indicated was exclusive, and that the act giving

jurisdiction to the Court of Claims had no application. The principle asserted in the case cited has no application to this case.

Although the right to recover back the excess of payment in this proceeding is based upon the statute of 1880, we do not think it comes within the principle of those cases which hold that where a liability and a remedy are created by the same statute, the remedy thus provided is special and exclusive. In this case it is not a right and a remedy created by the same statute. The statute creates the right to have repayment under the facts therein stated, but it gives no remedy for a refusal on the part of the Secretary to comply with its provisions. The person has the right under the act to obtain a warrant from the Secretary of the Interior for the repayment of the excess therein mentioned, and for the purpose of obtaining it he must make his application and prove the facts which the statute provides, and then the Secretary is to draw his warrant on the Treasury. This constitutes the right of the appellant. Applying for the warrant is not a remedy. When application for repayment is made there is nothing to remedy. He has not been wronged. A right of repayment of money theretofore paid has been given by the act, but it is only under the act that the right exists, and that right is to have the Secretary in a proper case issue his warrant in payment of the claim, and until he refuses to do so, no wrong is done and no case for a remedy is presented. After the refusal, the question then arises as to the remedy, and you look in vain for any in the act itself. We cannot suppose that Congress intended in such case to make the decision of the Secretary final when it was made on undisputed facts. If not, then there is a remedy in the Court of Claims, for none is given in the act which creates the right. The procedure for obtaining the repayment as provided for in the act must be followed, and when the application is erroneously refused, the party wronged has his remedy, but that remedy is not furnished by the same statute which gives him the right.

If there were any disputed questions of fact before the Secretary his decision in regard to those matters would probably

be conclusive, and would not be reviewed in any court. But where, as in this case, there is no disputed question of fact, and the decision turns exclusively upon the proper construction of the act of Congress, the decision of the Secretary refusing to make the payment is not final, and the Court of Claims has jurisdiction of such a case.

We have been referred to no case in this court which holds views contrary to those herein presented. We do not mean by this decision to overrule or to throw doubt upon the general principle that where a special right is given by statute, and in that statute a special remedy for its violation is provided, that in such case the statutory remedy is the only one, but we hold that such principle has no application to this particular statute, because the statute does not, in our judgment, within the meaning of the principle mentioned, furnish a remedy for a refusal to grant the right given by the statute.

This case bears more resemblance to *United States* v. *Kaufman*, 96 U. S. 567, and *United States* v. *Savings Bank*, 104 U. S. 728, than it does to *Nichols* v. *United States*, 7 Wall. 122.

In *United States* v. *American Tobacco Company*, 166 U. S. 468, the statute permitted the holder of stamps which he had paid for and not used, and which were spoiled or destroyed, etc., to apply to the Commissioner of Internal Revenue to redeem or make allowance for such stamps. Application was so made, but the Commissioner refused to redeem or make the allowance because of other facts stated in the case. The applicant filed his petition in the Court of Claims, and that court gave him judgment which was here affirmed. It is true that no question of jurisdiction was raised, but if the case at bar was properly decided by the court below, the court in that case had no jurisdiction, because the right to obtain redemption or payment was given by the same statute which provided the procedure to secure it, and the so-called remedy would have been exclusive in that case, as it is held to be exclusive in this. The party had to apply to the Commissioner and to comply with regulations, etc., all of which was but a part of the right which was granted, and when the Commissioner

erroneously refused to make the redemption as provided for by the statute, the claimant, founding his claim upon a law of Congress, pursued his only remedy in the Court of Claims, and obtained it without any question of jurisdiction. We think the court had jurisdiction in that case, and that it also existed in this.

We come now to the question as to the true construction of the act itself, and whether it is applicable to the facts in this case.

It is conceded by the appellant that at the time the entry was made and the double minimum price paid for the lands, they were within the place limits of the grant to the Wisconsin Central Railroad. The payment therefore was a proper payment, and necessary to have been made in order to obtain the lands. There was no mistake or misunderstanding of the facts at the time the entry was made. It was made eight years after the passage of the land grant by Congress, March 5, 1864, and at the time the payment was made the railroad had not been built. The Government of course was no guarantor that the railroad ever would be built, and the party thus making an entry of lands within the place limits of a railroad grant necessarily took his chances of the future building of the road. That it was not certain to be built was sufficiently apparent at the time of the entry, for eight years had then elapsed, and no road had been built at that time. It was not until eighteen years after the entry, viz., in 1890, that the Government finally forfeited the lands because of the failure of the company to build the road. With reference to these facts, we think that the construction placed upon the act of 1880 by the Secretary of the Interior is the correct one.

The Secretary decided that the act does not apply to a case such as this, where at the time of the entry the lands were within the limits of the railroad land grant, and so continued for eighteen years, and where it was only by the failure of the railroad company to build the road and the forfeiture of the land grant by the Government consequent upon such failure that the land then ceased to be within such limits.

Whatever may have been the reason of Congress in making

the charge of $2.50 per acre the minimum price for alternate sections along the line of railroads within the place limits of the grant, the meaning of the act of 1880 is not in anywise affected thereby. That act plainly referred to the case of a mistake in location at the time when the entry was made. Where the parties supposed that the land entered was within the limits of the land grant, and where subsequently it is discovered that the lands were not within those limits, that a mistake had been made, and that the party had not obtained the lands which he thought he was obtaining by virtue of his entry, then the act of 1880 applies.

Here no mistake whatever has been made. The lands were within the limits of the land grant at the time of the entry, and so remained for many years and up to the time of the act of forfeiture by Congress. Whether the railroad would fulfil its obligations and in good time build its road through the land grant was a matter which the future alone could determine, was a matter which the entryman could judge of as well as the Government, and was a matter in regard to which the Government gave no guaranty, express or implied. Hence, when in subsequent years the company failed to build its railroad within the limits of the land grant at this point, and the same was forfeited, the Government was under no obligations whatever by virtue of the act of 1880 or otherwise to repay the difference in price for these lands.

While we agree with the Court of Claims in the dismissal of the petition, it is for a different reason. The petition should have been dismissed upon the merits, but we do not think it necessary to reverse the judgment on that account, as we can modify it so that it shall provide for dismissing the petition on that ground.

Judgment modified, and as modified affirmed.